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No. 65119-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DANA CLAUSEN,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

BRIEF OF RESPONDENT CLAUSEN

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A. INTRODUCTION

The opening brief of Icicle Seafoods, Inc. ("Icicle") seeks to sanitize its reprehensible conduct in the administration of Dana Clausen's claim for maintenance and cure arising from his maritime personal injuries while in Icicle's employ. Dana Clausen was the Second Engineer on board the BERING STAR where he was seriously injured in the course of his duties.

Instead of meeting its time-honored obligation as the shipowner to provide maintenance and cure to Clausen as an injured seaman, Icicle did everything it could to deny Clausen necessary medical attention to which he was entitled and necessary room and board during his recovery.[1] After being properly instructed, the jury determined that Icicle not only unreasonably withheld maintenance and cure from Clausen, it "was callous and indifferent or willful and wanton" in its withholding of maintenance and cure to Clausen.

The trial court properly awarded attorney fees to Clausen in connection with Icicle's wrongful withholding of maintenance and cure. Given the assignments of error in its brief, Icicle has effectively *conceded* that it violated Clausen's right to maintenance and cure, justifying an

[1] For example, Icicle makes no mention of the trial court's order sanctioning Icicle and its trial counsel for intentionally withholding key documents, including a medical report by Icicle's selected physician that Clausen's claim for maintenance and cure should not have been closed by Icicle.

award of attorney fees and punitive damages against it. The trial court properly calculated the fee award for Clausen's counsel.

Under recent United States Supreme Court authority allowing an award of punitive damages against a shipowner that wrongfully withholds maintenance and cure to an injured seaman, the jury awarded punitive damages against Icicle. Again, Icicle has effectively *conceded* that punitive damages should be awarded. It only objects to the amount. The jury's decision on punitive damages should not be limited by an artificial cap, as Icicle contends.

B. ASSIGNMENTS OF ERROR[2]

Clausen acknowledges Icicle's assignments of error,[3] but believes the issues pertaining to the assignments of error are more appropriately formulated as follows:

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[2] Given the fact that Icicle has not assigned error to the trial court's Jones Act instructions, the maintenance and cure instructions, or that portion of the judgment relating to Clausen's Jones Act/maintenance and cure recovery, Icicle's liability to Clausen for its negligence and failure to pay Clausen maintenance and cure is not at issue. It is striking, however, that Icicle has only satisfied the maintenance and cure portion of the judgment and not the negligence portion. CP 618-24. Icicle satisfied the maintenance and cure portion of the judgment for its own benefit – to curtail its exposure to post-trial attorney fees. CP 608-13. Icicle *continues* to be oblivious to Clausen's needs and it deprives Clausen of compensation for injuries even it *concedes* it owes to Clausen.

[3] Icicle's assignments of error fail to comply with RAP 10.3(g). That rule *requires* a separate assignment of error for "each finding of fact a party contends was improperly made" with a "reference to the finding by number." RAP 10.4(c) required Icicle to set forth the findings to which it objected verbatim in the brief or an appendix. As the trial court here made an express ruling on attorney fees with specific findings in that ruling, CP 420-33, Icicle was obligated to identify each finding in that ruling to

1. Did the trial court abuse its discretion in denying Icicle's motion for judgment as a matter of law under CR 50 as to Clausen's attorney fees where the basis for the fee award to Clausen was the equitable exception to the American Rule on attorney fees as costs or under the equitable power of the court, and such a decision is one for the court, not the trier of fact?

2. Did the trial court abuse its discretion in calculating the amount of the fees to which Clausen was entitled where the trial court properly applied the lodestar method in determining Clausen's counsel's hourly rates were reasonable and the hours spent on his behalf, after suitable reductions, were reasonable?

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which it objected. The Court and Clausen should not be compelled to guess at what facets of the fee award Icicle finds objectionable where Icicle seemingly has not challenged *numerous* aspects of the trial court's findings. *In re Marriage of Stern*, 57 Wn. App. 707, 710, 789 P.2d 807, *review denied,* 115 Wn.2d 1013 (1990) ("The intended purpose of these rules is to add order to and expedite appellate procedure by eliminating the laborious task of searching through the record for such matters as findings to be claimed in error."). It only assigned error generally to the trial court's "Findings and Conclusions Regarding the Award of Attorney's Fees." Br. of Appellant at 2. It has long been the rule in Washington that unchallenged findings of fact are verities on appeal. *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

Icicle's failure to comply with the rule means this Court should not consider Icicle's claim of error on the amount of Clausen's fees. RAP 10.3(g) states: "The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto." Plainly, nothing in Icicle's issues reveals *anything* regarding Icicle's arguments that Clausen's attorneys failed to keep contemporaneous time records, br. of appellant at 22-24, or the contention on excessive hourly rates. *Id.* at 28-30. These arguments should be disregarded. *Thomas v. French*, 99 Wn.2d 95, 100, 659 P.2d 1097 (1983); *Stern*, 57 Wn. App. at 710.

3. Did the trial court abuse its discretion in denying Icicle's motion to amend the judgment under CR 59(h) where the trial court properly applied federal law on punitive damages a this maritime personal injury case where the culpability of the shipowner was great and the recovery was relatively small?

C. STATEMENT OF THE CASE

Dana Clausen was 52 years old when he was injured on the job while in Icicle's employ. RP 477. Originally from Louisiana, Clausen worked from the time he was 18 years old primarily as a pipe fitter; he typically worked in large oil and chemical refineries located along the Gulf Coast. RP 356-59. He left pipefitting and worked in home construction. RP 359-60.

Clausen seized an opportunity to work in Alaska, joining the crew of Icicle's BERING STAR. RP 360, 364. He worked on board that vessel for about three years; his last position was to the position of Second Engineer where he earned about $30,000 per year plus benefits, and room and board. RP 418. He was an excellent and valued worker. RP 792.

As the BERING STAR's Second Engineer, Clausen performed various duties. The vessel was equipped with a large shop with various tools for fabricating heavy steel parts, as well as areas to fix machinery used aboard the vessel. RP 370-76. On February 12, 2006, Clausen was

instructed to fabricate a steel plate to improve ventilation on board the ship. RP 388-89. He had a "go-fer" assistant assigned to assist him with lifting, but the young man was often missing when work needed to be done. RP 399-401. To perform his assigned task, Clausen lifted a 122-pound piece of steel up onto a fabrication table to work on it. RP 390. While lifting the steel piece he suffered a serious injury to his low back, neck, and hand. RP 388-91. He promptly reported the injury to Icicle. Ex. 180.1. Clausen went ashore in Dutch Harbor, Alaska for medical care, RP 391, staying on the vessel a few days longer. *Id.* Ultimately, he was sent home to Louisiana for medical care. RP 392. Clausen initially sought treatment at a local hospital. RP 503-04. He then received care from Dr. Robert Brennan, a physician who had treated him previously for a 2003 back injury. RP 385, 402.

Clausen, however, encountered persistent difficulties in getting Icicle, or its adjusting firm, Spartan, RP 574-75,[4] to meet its obligation to pay him maintenance and cure, traditional maritime remedies providing room and board and medical expenses, during his convalescence. In some instances, Clausen's medical providers waited as long as 2 years for bills to be paid by Spartan. Ex. 212; RP 669-73, 1544-45. However, Spartan did see fit to pay for the services of a nurse, Lori Gregoire of Professional

[4] Spartan reported extensively to Icicle on Clausen's claim. RP 575, 1465-66.

Dynamics, Inc., to monitor Clausen's treatment in Louisiana, actually paying her more than it paid out for Clausen's medical bills. RP 402, 573-74, 833, 1527-28. She attended many of Clausen's medical appointments and reported extensively to Spartan on Clausen's course of treatment. Ex. 211; CP 492-506.

Clausen's injuries to his back, neck, and hand prevented him from performing any work for which he was qualified. RP 416. Although Icicle paid Clausen his wages due him under his contract with the company, RP 1513, 1588, those wages terminated in June, 2006. *Id.* Icicle paid Clausen $20 per day for maintenance (room and board), expecting that this sum would cover lodging, utilities, and meals. RP 406.[5] Clausen was reduced to living in a broken-down recreational vehicle ("RV") with no heat, air conditioning, running water, or toilet facilities; the RV's roof leaked and could not be repaired. RP 421-23. Icicle knew Clausen was living in the decrepit RV. CP 554. Nevertheless, Icicle terminated the maintenance and cure to Clausen in August, 2006, RP 912, but it paid an additional sum of $1500 to Clausen in 2007. *Id.*

In addition to manipulating the payment of maintenance to Clausen, Icicle withheld the payment of cure (medical expenses) necessary

[5] Icicle's Kurt Gremmert offered the incredible testimony at trial, obviously disbelieved by the jury, that a person could live on $20 per day, enjoying clean and safe lodging and three meals. RP 841-42. *See also,* RP 678-86 (Icicle's Moore's testimony on maintenance).

for his recovery. As a result of his on-the-job injury, Clausen experienced severe pain. For example, on June 9, 2006, Gregoire reported to Spartan that "Mr. Clausen reports increased pain to his hips and flare upon on Saturday, described as 'lightning bolt' that lasted about ten minutes to his left hip. Dr. Brennan deferred any work release and recommended referral to a neurosurgeon, Dr. Isaza." CP 491. Later that summer, Clausen visited Dr. Isaza whose August 17, 2006 chart note stated:

> Patient advised to go to ER if medicine is not helping his pain. His friend "franny" is aware of this – she states patient has threatened to kill himself and we advised her to go to ER –

CP 522. Gregoire reported this to Icicle. CP 492-93.

Although Dr. Brennan opined that Clausen's condition in April-May 2006 had reached maximum medical cure, allowing for the closure of his claim, Exs. 183.8-183.9; CP 515-16,[6] Spartan was dissatisfied with Dr. Brennan's conclusion that Clausen's condition had stabilized and he needed no further curative treatment. RP 900, 1472.[7] Spartan sought a second opinion, RP 1472,[8] selecting the Seattle Panel of Consultants to conduct a review of his medical records and status. RP 902-04. In a June

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[6] Dr. Brennan's May 19, 2006 report actually referred to Clausen as "she." Ex. 183.9; CP 515.

[7] Spartan's adjusters thought Dr. Brennan was "not at the top of his game" in evaluating Clausen. RP 591.

[8] Gregoire recommended a second opinion as well. RP 1472-73.

20, 2006 letter, just prior to Icicle's termination of his maintenance and cure, Dr. Richard E. Marks, a physician *selected by Spartan*, RP 1505, told Icicle that Clausen had not reached maximum medical cure, he needed treatment by epidural steroid injections, and he was a candidate for surgery. Ex. 200; CP 475-79.[9]

Not only did Icicle refuse to pay for Dr. Marks' recommended treatment, it undertook a campaign to obtain a cheap, early settlement of Clausen's overall injury claim before he was represented by counsel. Spartan and Icicle were both well aware of the legal standards for maintenance and cure that required them to take appropriate steps to ensure that Clausen received appropriate room and board and curative treatment. RP 563-70, 1491. Spartan was clearly aware that Clausen's injuries were serious, noting as early as May 19, 2006 that the doctors believed his injuries were "career ending." CP 480. This was confirmed in Spartan's Marion Hanses' more formal May 25, 2006 report to Icicle's insurer. CP 489. Spartan was fearful that Clausen would secure legal representation and the value of his claim would escalate:

> ... our concern is for the possibility that Mr. Clausen will seek legal representation. Should this occur, the attorney will likely seek general damages for his client who is facing a career-ending injury and the value of this claim will increase considerably. Overall, we see the most beneficial

[9] This report was never disclosed to Gregoire or Clausen. RP 1512.

> choice is to settle this matter now rather than wait for attorney involvement.

CP 489.

In general terms, Chris Klein of Icicle agreed Clausen's condition was career-ending and he didn't "like the looks of this one." CP 480. Spartan/Icicle wanted to act "before this guy gets away from us." CP 481. They wanted to be sure to "corral this guy." CP 484.

Recognizing Clausen's claim was "wide open," Icicle/Spartan decided upon a strategy that included a neurological referral, medical records review, communication with Clausen directly to obtain a settlement, and even surveillance of Clausen. Ex. 197; CP 482-83. This strategy was concocted without any thought of Clausen or his medical needs. RP 1504. The hope was that Clausen would "take the bait" and back down from his medical treatment in order to get money upon closure of the file. CP 483. Spartan/Icicle simply wanted to avoid the $40,000-$75,000 expense of back surgery that Dr. Marks thought might be necessary. CP 477, 478; RP 1483-84, 1491-92. Spartan also knew that Clausen's contractual wages were ending and that it could use the termination of Clausen's maintenance and cure to leverage a settlement favorable to Icicle. RP 1513-14.

Icicle and Spartan suppressed Dr. Marks' report. In a very revealing June 28, 2006 telephone note, Klein stated: "Read med recs review Rpt – Not good for Icicle." Exs. 198-99; CP 484. Gregoire recommended that Clausen follow up with Dr. Isaza on surgery, thereby agreeing with Dr. Marks, not Dr. Brennan, regarding Clausen's status. Ex. 207; RP 1533-34, 1608-09, 1611. However, despite the opinions of Dr. Marks and Gregoire, Icicle continued to insist in September and December 2006 that Clausen had reached maximum medical cure. Ex. 183.39; CP 512-16.

In September 2007, Icicle even went so far as to sue Clausen in federal court to terminate his right to maintenance and cure. CP 517-21.[10] Upon the filing of the action, Clausen issued subpoenas to all of his

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[10] Icicle's complaint asserted:

> Throughout this matter Mr. Clausen has impeded his employer's right and obligation to investigate Mr. Clausen's ongoing entitlement to maintenance and cure by way of example and without limitations, failing to keep Icicle Seafoods, Inc. apprised of his medical status, failing to provide Icicle Seafoods, Inc. with copies of medical records, failing to adequately allow Icicle Seafoods, Inc. access to the treating physicians, failing to seek authorization for medical treatment, failing to apprise Icicle Seafoods, Inc. of medical bills, and generally either failing entirely to coordinate his utilization of the benefits of maintenance and cure with Icicle Seafoods, Inc. to such an extent that his employer's rights are a meliorate, or so delaying his provision of information and access to his employer that Icicle Seafood, Inc. has no effective involvement.

CP 519. Ultimately, the federal court dismissed Icicle's compliant once the state court action was commenced.

medical providers for their records once the complaint was filed; not only did those records plainly reveal that Icicle's statements were baseless, Spartan's files demonstrated that each one of these allegations was false. From progress reports and billing records it was clear that Gregoire was talking with Clausen and his doctors, RP 1523-24, and she reported all of this information in detail to Spartan. Ex. 211; CP 492-506. At the time Icicle filed its federal lawsuit, these records were present in Spartan's files. Ex. 202. Clausen also provided Spartan fifteen signed releases permitting access to his medical records. Ex. 209; RP 1539-41. Gremmert admitted on cross-examination that none of these releases for medical records were ever used. RP 1543, 1611.

Clausen filed the present action in the King County Superior Court on January 18, 2008 against Icicle seeking damages for its Jones Act negligence, the unseaworthiness of the BERING STAR, maintenance and cure wrongfully withheld, and punitive damages and attorney fees for Icicle's improper withholding of maintenance and cure. CP 1-14. The case was ultimately assigned to the Honorable Hollis R. Hill for trial.

The trial court gave extensive instructions to the jury on the Jones Act, unseaworthiness, and maintenance and cure. CP 1670-94. In particular, the court gave the jury two instructions on Icicle's wrongful withholding of maintenance and cure and punitive damages. In

Instruction Number 15, the court set forth the standard for Icicle's liability for punitive damages. RP 1687. *See* Appendix. In Instruction Number 13, the court advised the jury of the law on the amount of punitive damages. CP 1685-86. *See* Appendix. Icicle did not object to either instruction.[11]

After a two-week trial, and two and half days of deliberation, CP 225, the jury returned a verdict in Clausen's favor. CP 107-15. The jury responded to extensive interrogatories, concluding that Icicle was negligent, although it found Clausen was comparatively at fault by 44%. CP 109-10. The jury rejected Clausen's unseaworthiness claim. CP 110. The jury found past damages of $209,100, CP 111, and future damages of $244,000, CP 111-12, for a total of $453,100.[12] The jury found that Clausen did not fail to mitigate his damages. CP 112. Although it determined Clausen reached maximum medical cure on April 23, 2009, CP 112, the jury also concluded that Icicle not only unreasonably withheld maintenance and cure, CP 113, but it was "callous and indifferent, or willful and wanton" in failing to do so, awarding Clausen $1.3 million in

[11] Icicle's failure to assign error to either instruction renders the instructions the law of the case. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 917, 32 P.3d 250 (2001).

[12] The jury entered a supplemental verdict in which it determined that Clausen's loss of maintenance and cure was respectively $19,300 and $18,120. CP 108.

punitive damages. CP 114.[13] Upon the rendering of the verdict, Clausen's counsel promptly advised the trial court that Clausen would be seeking a fee award. RP 1869.

Clausen noted a judgment on the jury's verdict for presentation, but Icicle opposed the entry of the judgment. CP 141-48.

Clausen filed a timely motion for an award of attorney fees with extensive documentation of fees, CP 149-263, but Icicle opposed the fee request. CP 264-99. Clausen replied, providing further documentation on the fees incurred on his behalf. CP 300-74.

The trial court entered the judgment on the jury's verdict on January 29, 2010. CP 434-35. That same day, the court entered findings of fact and conclusions of law on the fee award, which were extensive. CP 420-33. *See* Appendix. The court articulated the basis for a fee award, applying the lodestar method and the factors analysis of *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67 (9th Cir. 1975). CP 421-24. The court

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[13] Icicle has not assigned error to the jury's factual determination that Icicle was "callous and indifferent, or willful and wanton in its failure to pay cure." Br. of Appellant at 2. Washington law distinguishes between special verdicts and general verdicts with interrogatories. CR 49; Karl B. Tegland, 14A *Wash. Prac. Civil Procedure* § 32.17. This case involved a general verdict with interrogatories. CR 49(b). Icicle's failure to assign error to the jury's decision on the interrogatories waives any challenge to the jury's finding. *Tuthill v. Palermo*, 14 Wn. App. 781, 785 n.1, 545 P.2d 588, *review denied*, 87 Wn.2d 1002 (1976).

found the hourly rates of Clausen's counsel[14] to be reasonable. CP 426-27. The court addressed the segregation of time spent on unsuccessful theories, reducing the hours by 10%. CP 427-28. The court also addressed the *Kerr* factors in explicit detail. CP 428-31. The court awarded fees of $387,558 and costs of $40,547.57. CP 432-33. *See* Appendix.

After a hearing on sanctions, RP 1870-1901, the court entered an order on January 29, 2010 granting Clausen's motion for sanctions in connection with the failure of Icicle and its counsel to turn over to Clausen's counsel the entire adjuster file, omitting Dr. Marks' panel report as well as Icicle communications acknowledging that the report "did not look good" for Icicle. CP 415-19. *See* Appendix. The court found that Icicle and its counsel violated CR 26(g) and CR 26(e)(2), noting that the violation was "reckless." CP 416. In particular, the court sanctioned the failure of Spartan's Kurt Gremmert to turn over his entire adjusting file, including the consulting medical panel's report that was unfavorable to Icicle. CP 416. That report was referenced in communications made by Icicle and its adjusters that were reviewed by its counsel. CP 417. The court took issue with the certification by Icicle and its counsel that production was complete and counsel's failure to more rapidly disclose the

[14] The court specifically noted that Clausen did not request "any paralegal time as they could have done." CP 427.

insufficient production. CP 416, 417-18. The court imposed sanctions of $10,000 against Icicle and $5,000 against its trial counsel. CP 418.

Icicle then filed a motion to amend the judgment challenging the jury's punitive damage award. CP 439-70. Clausen opposed the motion. CP 471-541. The trial court entered an extensive order denying Icicle's motion. CP 548-63. *See* Appendix. The court granted Clausen's motion for a supplemental award of fees in connection with the post trial motions, awarding $3,825 "incurred to secure a maintenance and cure award." CP 630.[15] *See* Appendix. Icicle filed its notice of appeal to this Court on March 26, 2010. CP 573-607.

D. SUMMARY OF ARGUMENT

On proper instructions, the jury found Icicle was negligent under the Jones Act and that Icicle not only unreasonably withheld maintenance and cure from Dana Clausen, it acted in a fashion that was "callous and indifferent, or willful and wanton."

Given the jury's determination, Clausen was entitled to an award of attorney fees. The calculation of that award was for the court and not the jury. The trial court did not abuse its discretion in calculating the

[15] Icicle did not assign error to the supplemental fee award. Br. of Appellant at 2. That fee decision obviously could not be made by the jury and had to be made by the trial court. Icicle's failure to assign error to that order rendered it the law of the case, and yet another example of a conceded final judgment Icicle has studiously refused to satisfy.

amount of attorney fees to which Clausen was entitled for Icicle's wrongful withholding of maintenance and cure.

Given the jury's determination regarding Icicle's conduct on maintenance and cure, Clausen was also entitled to an award of punitive damages for Icicle's wanton and willful refusal to pay maintenance and cure. An award was plainly appropriate to punish Icicle's reprehensible conduct and to deter it from engaging in such conduct in the future.

The jury was properly instructed on punitive damages and its award to Clausen should stand. In assessing the punitive damages award, the compensatory award includes both the amount of maintenance and cure wrongfully withheld and the attorney fees incurred by Clausen to address Icicle's wrongful withholding of maintenance and cure.

A 1:1 ratio of punitive damages to compensatory damages determined in to apply in *Exxon Shipping Co. v. Baker*, ___ U.S. ___, 128 S. Ct. 2605, 171 L.Ed.2d 570 (2008), a case involving shipowner *recklessness*, does not apply here in a case of heightened shipowner wrongful conduct. The jury's verdict does not offend federal due process principles applicable to punitive damage awards. Moreover, as this is a case tried in state court, Washington state procedural principles apply and Washington's constitutional deference to jury verdicts compels affirmance of the jury's verdict.

Clausen is entitled to an award of attorney fees on appeal.

E. ARGUMENT[16]

(1) The Trial Court Did Not Abuse Its Discretion in Making the Fee Decision Here

Icicle contends that the trial court erred in not submitting the issue of Clausen's attorney fees to the jury and it also objects to the amount of the fees to which Clausen was entitled. Br. of Appellant at 8-30. In making these arguments, Icicle fails to properly articulate the standard of review for these issues and it does not address the fact that it has failed to preserve any issue associated with the court's decision of the fee issue by failing to assign error to the jury's verdict form, the failure to give its proposed instruction number 22 on attorney fees, CP 88, or to offer a correct instruction on the fee issue.

(a) Icicle Did Not Preserve Any Alleged Error in Deciding the Fee Issue

Icicle assumes that because it filed a CR 50 motion on the issue of attorney fees, CP 97-106, it has preserved for the appellate review the issue of whether the trial court should have decided the fee issue instead of the jury. But when the jury was instructed on November 10, 2009, Icicle did not assign error to the failure to give its proposed instruction number

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[16] Icicle did not assign error to *any* of the trial court's evidentiary rulings or its instructions to the jury. The trial court's instructions now constitute the law of the case. *Hojem v. Kelly*, 93 Wn.2d 143, 145-46, 606 P.2d 275 (1980).

22 or the trial court's special verdict form. Moreover, its proposed instruction number 22 was an incorrect statement of Washington law.

CR 51(f) is unambiguous. It requires a party aggrieved by an instruction or the failure to give an instruction to advise the court stating "distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made." This rule also applies to verdict forms. *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP,* 110 Wn. App. 412, 427, 40 P.3d 1206 (2002); *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha*, 126 Wn.2d 50, 63, 882 P.2d 703, 891 P.2d 718 (1994). In this case, Icicle did not preserve any alleged error in having the court decide the amount of fees to which Clausen was entitled by failing to object to the court's failure to give its proposed instruction number 22 or to the court's verdict form.[17]

The consequence of Icicle's failure is also clear. In *Bitzan v. Parisi*, 88 Wn.2d 116, 558 P.2d 775 (1977), our Supreme Court held that the failure to properly object to an instruction under CR 51(f) rendered the

[17] Additionally, in order to preserve an instructional error for appellate review a party must offer a correct statement of the law. *Crossen v. Skagit County*, 100 Wn.2d 355, 360-61, 669 P.2d 1244 (1983); *City of Bellevue v. Kravik*, 69 Wn. App. 735, 740, 850 P.2d 559 (1993). Icicle's proposed instruction number 22 was not a correct statement of Washington law as it omitted any reference to the line of cases that hold a segregation of hours is not required where the core facts of several theories for recovery are intertwined. *See infra.*

instruction the law of the case "just as if no exception had been taken." *Id.* at 125. More critically for this case:

> ... if the motion for new trial is based upon error in giving [an instruction], neither this court nor the trial court may grant a new trial for such error unless the error is reviewable. It is not reviewable either in this court nor the trial court on motion for new trial if the exception taken at the time of trial was inadequate.

Id.[18] *See also, Trueax v. Ernst Home Center, Inc.*, 124 Wn.2d 334, 339-40, 878 P.2d 1208 (1994); *Ittner v. McDonald*, 190 Wash. 526, 69 P.2d 566 (1937).

In *Kim v. Dean*, 133 Wn. App. 338, 135 P.3d 978 (2006), this Court held that a motion for judgment as a matter of law was reviewable even where a party had not made objections to an instruction bearing on the subject of the motion. However, this Court did not address *Ittner, Bitzan*, or *Trueax* which hold that a motion for a new trial based on instructional error is foreclosed if proper objections are not made pursuant to CR 51(f).

Icicle did not object to the failure to give its instruction on attorney fees as damages or the verdict form. It should not be allowed to wait and speculate on the verdict and then raise objections it should have made

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[18] In *Micro Enhancement Int'l, supra,* Division III noted that the objections to the instruction and/or verdict form must stand on their own, noting "we do not consider statements made in a motion for new trial, on reconsideration, or on appeal." 110 Wn. App. at 427.

under CR 51(f) in a post-trial motion. *Agranoff v. Morton*, 54 Wn.2d 341, 346, 340 P.2d 811 (1959). Icicle waived any alleged error associated with the trial court's decision on the amount of fees.

(b) The Issue of Fees Here Was One for the Court and Not the Jury

Even assuming Icicle has preserved the issue of whether the court or the jury here should have decided fees, Icicle's argument in its brief at 9-20 that the jury must decide the amount of such fees is wrong. The trial court properly determined that it, not the jury, decides the amount of any attorney fees to which Clausen was entitled. CP 421-22.

The essence of Icicle's argument is that CR 54(d)(2) requires submission of the attorney fee issue to the jury because attorney fees here are an element of damages, citing selected 5th Circuit cases and *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P.3d 1153 (2007) in support of its contention. Washington law in rare circumstances does draw a distinction between fees as damages and fees as costs. The *only* line of cases in Washington, however, where fees are damages involve the exposure of a party to litigation with others. *Manning v. Loidhamer*, 13 Wn. App. 766, 538 P.2d 136, *review denied*, 76 Wn.2d 1001 (1975); *Shoemake v. Ferrer*, 143 Wn. App. 819, 830-31, 182 P.3d 992 (2008), *aff'd*, 168 Wn.2d 193, 225 P.3d 990 (2010); *Hough v.*

Stockbridge, 152 Wn. App. 328, 348, 216 P.3d 1077 (2009), *review denied*, 168 Wn.2d 1043 (2010). That is not the type of action present here.

The central flaw in Icicle's analysis, however, is its vast overstatement that fees in a case involving the wrongful withholding of maintenance and cure constitute an element of the seaman's punitive damages.

The flaw in Icicle's argument begins with its treatment of *Vaughan v. Atkinson*, 369 U.S. 527, 82 S. Ct. 997, 8 L.Ed.2d 88 (1962). There, the United States Supreme Court recognized that an injured seaman was entitled to recover fees in a case where the shipowner deprived the seaman of maintenance and cure. In that case, the shipowner made no investigation of the seaman's claim, but refused to pay maintenance and cure, forcing the injured seaman to hire counsel. *Id.* at 528-29. The Court invoked its equitable power in admiralty to grant relief. *Id.* at 530. Citing *THE APOLLON*, 22 U.S. 362, 6 L.Ed. 111 (1824), the Court also rejected the award of fees as costs "in the conventional sense," instead emphasizing "Our question concerns damages." 369 U.S. at 530. The Court stated that failure to pay maintenance and cure gives rise to a cause of action for damages, citing *THE IROQUOIS*, 194 U.S. 240, 24 S. Ct. 640, 48 L.Ed.2d 955 (1903), and the damage recovery includes "necessary

expenses." 369 U.S. at 530. The Court concluded that "[i]t is difficult to imagine a clearer case of *damages* suffered for failure to pay maintenance than this one." (emphasis added). *Id.*[19]

As Professor Robertson, a maritime expert relied upon by our Supreme Court in *Endicott v. Icicle Seafoods, Inc.,* 167 Wn.2d 873, 882 n.1, 224 P.3d 761, *cert. denied,* 130 S. Ct. 3311 (2010), noted, *Vaughan* is far from clear. Robertson described the opinion as "enigmatic," "murky," and "muddled." David W. Robertson, *Court-Awarded Attorneys' Fees in Maritime Cases; The "American Rule" in Admiralty,* 27 J. Mar. L. &. Com. 507, 552, 553 (1996). He notes that *Vaughan's* author, Justice Douglas, invokes at least 3 different analytical grounds for the result – fees as an equitable exception to the American Rule on fees as costs, admiralty's historic right to award fees as damages, and fees as damages for the wrongful withholding of maintenance and cure – without clearly

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[19] On remand, the district court treated the fee award as compensatory:

> As this court interprets the language of the Supreme Court, the intent and purpose of the same is that the trial court should make the seaman "whole", i.e., he should not be required to pay money out of his pocket to collect maintenance lawfully due to him. To accomplish this fact, the respondents are required to pay, by way of damages, a reasonable attorney's fee to libellant's proctor for prosecuting the proceedings made necessary to collect the seaman's maintenance to claim. . . .
>
> We do not read the majority opinion of the Supreme Court as suggesting that punitive damages are in order.

Vaughan v. Atkinson, 206 F. Supp. 575, 576 (E.D.Va. 1962).

deciding which controls. *Id.* at 553. Justice Stewart's *dissent* is the only place in the opinion where the theory that fees are an indirect element of punitive damages is advanced as a rationale for the result. *Id.*

Icicle assumes that because the *Vaughan* court made reference to fees as damages, that ends the analysis. Br. of Appellant at 9-10. While some federal courts like the Fifth Circuit have read *Vaughan* literally, *Holmes v. J. Ray McDermott & Co.*, 734 F.2d 1110, 1118 (5th Cir. 1984) (a 1984 case that has been overruled),[20] that is far from the universal analysis of *Vaughan.* Numerous courts view *Vaughan* as creating an equitable exception to the American Rule on attorney fees as costs for bad faith or vexatious conduct by a party.[21] Indeed, the United States Supreme Court has cited *Vaughan* for that precise reason.[22] Under Washington law,

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[20] *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5th Cir. 1995).

[21] Washington law recognizes this equitable exception to the American Rule. *Miotke v. City of Spokane*, 101 Wn.2d 307, 678 P.2d 803 (1984); *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 961 P.2d 343 (1998). *Forbes v. American Building Maintenance*, __ Wn.2d ___, ___ P.3d ___, 2010 WL 3911349 (2010). *See also, Rogerson Hiller Corp. v. Port of Port Angeles,* 96 Wn. App. 918, 982 P.2d 131 (1999), *review denied,* 140 Wn.2d 1010 (2000).

[22] *See, e.g., Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 n.4, 88 S. Ct. 964, 19 L.Ed.2d 1263 (1968); *Hall v. Cole*, 412 U.S. 1, 5, 93 S. Ct. 1943, 36 L.Ed.2d 702 (1973); *F.D. Rich Co., Inc. v. U.S. for Use of Indus. Lumber Co., Inc.*, 417 U.S. 116, 129, 94 S. Ct. 2157, 40 L.Ed.2d 703 (1974); *Aleyska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260, 95 S. Ct. 1612, 44 L.Ed.2d 141 (1975); *Runyon v. McCrary*, 427 U.S. 160, 183, 96 S. Ct. 2586, 49 L.Ed.2d 415 (1976); *Hutto v. Finney*, 437 U.S. 678, 98 S Ct. 2565, 57 L.Ed.2d 522 (1978); *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 765-66, 100 S. Ct. 2455, 65 L.Ed.2d 488 (1980); *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America*, 456 U.S. 717, 721, 102 S. Ct. 2112, 72 L.Ed.2d 511 (1982).

where fees are an aspect of a costs decision, the fee issue is for the court, not a jury. *Firchau v. Gaskill,* 88 Wn.2d 109, 114-15, 558 P.2d 194 (1977); *Hough,* 152 Wn. App. at 347-48.

Moreover, three United States Circuit Courts of Appeals have applied *Vaughan* as an equitable exception to the American Rule. Ninth Circuit Pattern Instruction No. 7.12, Maintenance And Cure—Willful And Arbitrary Failure To Pay, comments for use provides:[23] "If the jury finds that the defendant willfully and arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys' fees as determined by the court. A special interrogatory will be required." *See* Appendix.

Similarly, in *Incandela v. American Dredging Co.*, 659 F.2d 11, 15 (2d Cir. 1981), the Second Circuit held that *Vaughan* fees are assessed by the district court after the jury makes the factual finding as to whether the defendant's actions are willful and arbitrary. That court noted:

> Since the body determining the amount to be awarded is usually required to consider such technical matters as the relative difficulty of the case and the quality of preparation and advocacy involved, a trial judge is better equipped by training and experience to determine a reasonable amount than is a jury inexperienced in such matters.

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[23] The comment relies upon *Kopczynski v. THE JACQUELINE*, 742 F.2d 555, 559 (9th Cir. 1984), *cert. denied,* 47 U.S. 1136 (1985) where the district court asked the jury to answer a special interrogatory concerning the defendant's willful or arbitrary conduct. The jury determined that that conduct was not willful or arbitrary and the court therefore refused to award attorney fees. The Ninth Circuit affirmed.

Id. at 15 (citation omitted). *See also, Williams v. Kingston Shipping Co., Inc.*, 925 F.2d 721, 726 (4th Cir. 1991) (after the jury decided the defendant acted in bad faith, the trial judge awarded the fees).

Thus, three circuits, including our own Ninth Circuit, utilize the very same method employed by the trial court here to handle fees in a case like this.

Finally, *Vaughan's* result may be based on an exercise of equitable power in admiralty. This Court so concluded in *Paul v. All Alaskan Seafoods, Inc.,* 106 Wn. App. 406, 426, 24 P.3d 447 (2001), *review granted*, 145 Wn.2d 1015 (2002) ("equity may warrant an award of attorney fees in admiralty cases," citing *Vaughan*). Thus, applying the two-step analysis of *Endicott* with respect to a jury right under article I, § 21 of the Washington Constitution, 167 Wn.2d at 884, no jury right is available to Icicle on attorney fees because a jury right does not apply to equitable actions. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 365, 617 P.2d 704 (1980).

The trial court here was correct in treating the fee award as one of costs justified by *Vaughan*'s adoption of an equitable exception to the American Rule for bad faith or vexatious conduct or as a matter of federal court's equity power in admiralty. The trial court certainly did not abuse

its discretion in deciding that the court, not the jury, decides the amount of fees to which Clausen was entitled.

(c) The Trial Court Properly Calculated the Fees to Which Clausen Was Entitled

Icicle also argues that the trial court erred in calculating the fee award to Clausen. Br. of Appellant at 21-30. In particular, Icicle complains about the trial court's alleged failure to segregate the fees related to Clausen's maintenance and cure claims from those associated with his other claims and the hourly rates of Clausen's trial counsel.[24]

Icicle's central contention is that where a party fails to draw attention to flaws in a prevailing party's fee request, the court nevertheless has some overarching duty to "scrutinize" a fee request to find problems the opposing party did not articulate. Such an argument is baseless. Icicle's argument is designed only to cover up the fact that *Icicle failed to offer any evidence that the hours spent by Clausen's counsel were unreasonable.* CP 425-26. The cases Icicle cites for the proposition that a court must "painstakingly" "scrutinize" a fee request for flaws not identified by the party opposing the fee award do not support its position.

[24] Icicle also bemoans the lack of contemporaneous time records. Br. of Appellant at 22-24. The records offered by Clausen met the requirement articulated in *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Such records "need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed, and the category of attorney who performed the work (i.e. senior partner, associate, etc.)." *Bowers*, 100 Wn.2d at 597. The trial court had no difficulty in addressing the hours spent by Clausen's counsel on the issues in the case. CP 423, 424-25, or segregating the hours. CP 427-28.

Williams actually holds that a court must apply the lodestar method for calculating a reasonable fee rather than simply accepting a contingent fee as the fee. *Jordan v. Multnomah County*, 815 F.2d 1258, 1263 n.8 (9th Cir. 1987) stands for the unremarkable proposition that a court "should not uncritically accept counsel's representations concerning the time expended." *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 149-51, 859 P.2d 1210 (1993) reaffirms the application of the lodestar method in Washington and that the trial court must make an independent decision on the fees.

Apart from extensive declarations of Clausen's own counsel, CP 149-224, 241-63, 310-66, the trial court here had the benefit of an expert opinion on the fees of Clausen's attorneys. CP 367-74. It had the benefit of a declaration on rates filed in federal court. CP 354-57. It exercised independent judgment on fees, as its thoughtful and comprehensive fee ruling plainly demonstrates. CP 420-33. Icicle did not assign error specifically to *any* of the trial court's findings of fact on fees. That failure rendered the findings *verities on appeal*. *See* n.10, *supra.* Moreover, the trial court's findings are supported by substantial evidence.[25]

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[25] Icicle neglects to remind the Court that it reviews the findings to determine if they are supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.,* 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *In re Marriage of Rockwell,* 141 Wn. App. 235, 242, 170 P.3d 572, *review denied,* 163 Wn.2d 1055 (2007). Icicle does not address the standard of review for fee calculation decisions at length. This Court reviews such

(i) Attorney Hours

The trial court did not abuse its discretion in finding the hours of Clausen's counsel reasonable. First, the trial court correctly noted that Icicle offered nothing specific regarding hours it claimed Clausen sought improperly. CP 425-26. It made a *tactical* decision not to rebut Clausen's requested hours. Icicle had a burden to identify hours that were improper. *Gates v. Rowland*, 39 F.3d 1439, 1449 (9th Cir. 1994); *Gates v. Deukmejian*, 987 F.2d 1392, 1397-98 (9th Cir. 1992) (recognizing party opposing fee application has burden of rebuttal—to submit evidence challenging the accuracy and reasonableness of hours requested).

Second, the trial court *did* segregate hours. It excluded 10% of the hours requested by Clausen. CP 427-28. Given the substantial discretion afforded Washington courts in assessing the hours requested by counsel and reducing them where appropriate, the trial court could choose to approach the segregation of hours on a percentage basis. *Absher Const. Co. v. Kent School District No. 415*, 79 Wn. App. 841, 848, 917 P.2d 1086 (1995) (this Court allowed 1/3 reduction in fees). *See also, Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074, 1087 (3d Cir. 1995) (fee

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decisions to determine if the trial court engaged in a manifest abuse of discretion in rendering such a decision. *Morgan v. Kingen*, 166 Wn.2d 526, 539, 210 P.3d 995 (2009). The trial court here did not abuse its discretion.

reduction of 10%); *Gates*, 987 F.2d at 1400 (percentage reduction acceptable tool for court in calculating reasonable fee award).

Finally, the factual grounds for Clausen's Jones Act negligence, wrongful withholding of maintenance and cure, and unseaworthiness claims overlapped, as Icicle *admits*. Br. of Appellant at 24. To the extent that claims are factually intertwined, Washington courts have held that segregation of hours need not occur *at all*. *Hume v. American Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994), *cert. denied,* 115 S. Ct. 905 (1995); *Mayer v. Sto Indus., Inc.,* 156 Wn.2d 677, 693, 132 P.3d 115 (2006). *See also, Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S. Ct. 1933, L.Ed.2d (1983) (civil rights plaintiff is entitled to fully compensatory fee encompassing all hours reasonably expended on the litigation; fee should not be reduced because plaintiff did not prevail on all contentions in case). Here, the core facts relating to Clausen's Jones Act, maintenance and cure, and unseaworthiness theories were intertwined, as the trial court found. CP 427-28.

(ii) Attorney Hourly Rates

The trial court analyzed the specific hourly rates of Clausen's attorneys and determined they were reasonable. CP 426. The court specifically noted evidence presented by the declaration of James Jacobsen relating to market rates for maritime attorneys. CP 426 n.2, 336-

52. Substantial evidence supported the trial court's determination that the hourly rates of the attorneys in this specialty area were reasonable.

(iii) Factors Analysis

In addition to employing the lodestar method described in *Bowers* and *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998), the trial court examined the whole fee for Clausen's counsel under the factors in *Kerr*. CP 428-31. Washington law similarly allows a court to check the lodestar fee against the analogous fee factors in RPC 1.5(a). *Mahler*, 135 Wn.2d at 433 n.20. Icicle fails to even discuss the trial court's *Kerr* analysis to which it did not assign error.

The trial court did not abuse its discretion in calculating the fee award for Clausen.

(2) The Trial Court Did Not Abuse Its Discretion in Denying Icicle's Motion to Amend the Judgment on the Jury's Punitive Damage Award

Icicle contends in its brief at 30-50 that the trial court erred in failing to amend the judgment to restrict the jury's punitive damage award.[26] Icicle does not deny that Clausen was entitled to punitive

[26] Icicle misstates the standard of review applicable to that decision as de novo review. Br. of Appellant at 30. Washington courts review the denial of a CR 59(h) motion to amend a judgment for an abuse of discretion by the trial court. *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 454, 191 P.3d 879 (2008). Additionally, attorney fee decisions by the trial court are reviewed for an abuse of discretion. *Allard v. First Interstate Bank of Wash.*, 112 Wn.2d 145, 148, 768 P.2d 998 (1989).

damages, based on the jury's verdict, it only contests the amount of punitive damages to which Clausen was entitled. The jury's decision here was entirely proper for all the reasons articulated in the trial court's well-reasoned order denying Icicle's motion to amend the judgment. *See* Appendix.

(a) The Public Policy of Maritime Maintenance and Cure for Injured Seaman

Injured seamen do not qualify for state or federal worker compensation for on-the-job injuries. RCW 51.12.100(1); 33 U.S.C. § 902(3)(G). Maritime law, however, has long recognized that a shipowner has a duty to a seaman injured on board a ship to provide that seaman room and board (maintenance) and medical treatment (cure).[27]

The doctrine has both humanitarian and practical bases.[28] In *THE IROQUOIS, supra,* the United States Supreme Court stated: "The duty to

[27] Maintenance is a subsistence allowance intended to cover the reasonable costs a seaman incurs for his food and lodging during the period of his illness. Thomas J. Schoenbau, *Admiralty and Maritime Law* § 6-32 at 358 (2d ed. 1994). Cure is an employer's obligation to pay for the medical care of the sick or injured seaman. *Id.* at 361. As the trial court here instructed the jury, RP 1683-84, the right to cure terminates when the injured seaman has achieved maximum cure, where the seaman's condition will not be improved by further treatment. *Permanente S.S. Corp. v. Martinez*, 369 F.2d 297, 98-99 (9th Cir. 1966). The trial court's Instructions Numbers 13 and 14, to which Icicle did not object, are an excellent description of maintenance and cure. RP 1682-86.

[28] As noted Justice Story stated in *Harden v. Gordon,* 11 F. Cas. 480 (D.Me. 1823), maintenance and cure protected the childlike and improvident seaman (who is usually "poor and friendless" and apt to acquire "habits of gross indulgence, carelessness and improvidence"), and advanced "the great public policy of preserving this important class of citizens for the commercial service and maritime defense of the nation." Shipowners derived an ultimate benefit since seamen were thereby encouraged "to

provide proper medical treatment and attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations." 194 U.S. at 241-42. The employer is the "legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not." *Id.* at 247. *See also, Farrell v. United States,* 336 U.S. 511, 516, 69 S. Ct. 707, 93 L.Ed 850 (1949) (maintenance and cure is inclusive and simple to administer with few exceptions or conditions). A seaman's right to maintenance and cure is liberally interpreted with all doubts resolved in favor of the seaman. *Vaughan*, 369 U.S. at 531-32. It is a no-fault remedy. *Calmar S.S. Corp. v. Taylor,* 303 U.S. 525, 527-28, 58 S. Ct. 651, 82 L.Ed.2d 993 (1938).

(b) Punitive Damages for the Wrongful Withholding of Maintenance and Cure by a Shipowner

Punitive damages have generally been held to be available in a number of maritime law settings. As early as 1818, for example, the United States Supreme Court in *THE AMIABLE NANCY,* 16 U.S. 546, 558, 4 L.Ed. 456 (1818) recognized that "exemplary damages" could be awarded against the wrongdoers in a marine trespass case. *See* David W. Robertson, *Punitive Damages in American Maritime Law*, 28 J. Mar. L. &

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engage in perilous voyages with more promptitude, and at lower wages." 11 F. Cas. at 483.

Com: 73 (1997). Some commentators, however, believed that after *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S. Ct. 317, 112 L.Ed.2d 275 (1990), a case described as a "bombshell," David W. Robertson, *Punitive Damages in U.S. Maritime Law: Miles, Baker, and Townsend*, 70 La. L. Rev. 463, 466 (2010), in which the United States Supreme Court held that families of a seamen killed by shipowner negligence or vessel unseaworthiness could not recover loss of consortium damages, that punitive damages in maritime cases would not be available in maritime cases. *Id.* at 466-67.

However, recognizing that maintenance and cure is a fundamental obligation of a shipowner to an injured seaman, the United States Supreme Court in *Atlantic Sounding Co., Inc. v. Townsend*, __ U.S. ___, 129 S. Ct. 2561, 174 L.Ed. 382 (2009) reaffirmed that a shipowner's willful and wanton refusal to pay maintenance and cure subjected the shipowner to an award of punitive damages. In writing for the majority, Justice Clarence Thomas considered the history of punitive damages under federal maritime law and concluded that such damages were available in maritime actions for tortious acts of a "particularly egregious nature." *Id.* at 2567. The Court concluded that this policy extended to maintenance and cure obligations owed by shipowners on humanitarian and economic grounds:

> Indeed, the legal obligation to provide maintenance and cure dates back centuries as an aspect of general maritime law, and the failure of a seaman's employers to provide him with adequate medical care was the basis for awarding punitive damages in cases decided as early as the 1800's.

Id. at 2568. The Court further concluded that Congress' enactment of the Jones Act did not alter this common law policy, *id.* at 2571, nor did the Act supplant common law remedies, including punitive damages, available to the injured seaman. *Id.* at 2574-75. The Court confirmed that an injured seaman could recover punitive damages from a shipowner that willfully and wantonly disregarded its obligation to pay maintenance and cure.

The Court's decision was entirely consistent with the punishment/deterrent purpose of punitive damages and it fit aptly with maintenance and cure setting. As the Alaska Supreme Court stated:

> When a shipowner refuses to pay maintenance and cure the seaman's only alternative is a lawsuit, which is a lengthy and expensive process. During this time, the seaman may have not funds to effect his recovery, and thus may be forced to work when he should be resting. In addition, the shipowner might use a refusal to pay maintenance as a bargaining tool, forcing an impoverished seaman to accept a low amount or face a lengthy court battle. Thus, the availability of punitive damages will act as a deterrent to the unscrupulous employer, and will result in more speedy resolution of maintenance and cure claims.

Weason v. Harville, 706 P.2d 306, 310 (Alaska 1985).

The absence of punitive damages would not only encourage unscrupulous shipowners to take advantage of unrepresented or poorly represented seamen, but a seaman with a maintenance and cure claim unaccompanied by a related Jones Act or unseaworthiness claim would have difficulty finding a competent lawyer. *Exxon*, 128 S. Ct. at 2622 (punitive damages may be necessary "when the value of injury and the corresponding compensatory award are small (providing low incentives to sue")).

In rendering its opinion, however, the *Townsend* court did not reach the issue of the appropriate cap, if any, that should be placed upon a punitive damages award.[29] That issue must be analyzed separately.

(c) The Jury's Punitive Damages Award Here Was Not Excessive

Icicle contends that the jury's punitive damages award to Clausen was excessive and should be limited to a 1:1 ration between compensatory and punitive damages. Br. of Appellant at 30-50. Icicle asks this Court to focus solely on *Exxon* and to ignore the Supreme Court's due process jurisprudence on punitive damages. *Id.* Icicle is wrong.

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[29] "Nor have petitioners argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. *See Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S. Ct. 2605, 171 L.Ed.2d 570, [slip op] at 42 (2008) (imposing a punitive-to-compensatory ratio of 1:1). We do not decide these issues." *Townsend*, 129 S. Ct. at 2561.

First, the jury was properly instructed on punitive damages in Instruction Numbers 13 and 15 (RP 1685-87) and ample evidence supports the jury's verdict. As recounted in Clausen's Statement of the Case, Icicle's conduct was cynically manipulative and reprehensible. The United States Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L.Ed.2d 809 (1996) indicated that "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." Thereafter, in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-21, 123 S. Ct. 1513, 155 L.Ed.2d 585 (2003), *cert. denied,* 543 U.S. 874 (2004) the Court identified markers of reprehensibility as follows: (1) Indifference to or reckless disregard for the health of others; (2) the target of the conduct was financially vulnerable; (3) the conduct involved repeated actions and was not isolated; (4) the harm was a result of intentional malice, trickery, or deceit, and was not an accident. *Id.* Deliberate false statements, acts of affirmative misconduct, and concealment of evidence of improper motive demonstrate reprehensible conduct. *BMW*, 517 U.S. at 575-80.[30] The Court should also consider the potential damage if the defendant had succeeded in its scheme, as well as

[30] The *Exxon* court specifically recognized that the case involved reckless conduct, 128 S. Ct. at 2632, and noted that some states authorize higher ratios for "malicious or dangerous activity designed to increase a tortfeasor's financial gain." *Id.* at 2631.

the size of the award that is required to deter the defendant from similar conduct in the future. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460, 113 S. Ct. 2711, 125 L.Ed.2d 366 (1993).

Clausen met all of the indicia for punitive damages, as Icicle concedes by not assigning error to the jury's punitive damages instruction or contending in its brief that Clausen was not entitled to punitive damages at all. A 1:1 cap is not required here and this Court should not intrude upon the decision of a properly instructed jury.

(i) The Compensatory Damage "Base" for Assessing The Punitive Damages Award

In assessing the jury's punitive damage award here, the Court appropriately looks to the compensatory award rendered by the jury. The jury found that Icicle withheld maintenance and cure to Clausen in the amount of $37,420, CP 108, and that it did so in a fashion entitling Clausen to a fee award. CP 113-14 (interrogatories nos. 13-14, 17-18). Icicle asserts that the fee award is punitive and should not be part of this calculation. Br. of Appellant at 45-49. It is wrong.

The authority cited by Icicle in support of its analysis is unavailing to its position. It makes a reference to a passing description of *Vaughan* in *Townsend*, which is, at best, dictum. Br. of Appellant at 46. The case it cites from the Eleventh Circuit, *id.* at 46-7, is from a circuit that

incorrectly focused on Justice Stewart's dissent in *Vaughan* where he mischaracterized the majority opinion as allowing fees as punitive damages. The Fifth Circuit case cited by Icicle is no longer good law in the Fifth Circuit. *See Guevara v. Maritime Overseas Corp.,* 59 F.3d 1496, 1503 (5th Cir. 1995) (court discusses *Vaughan* and notes that *Vaughan* is based on exception to American Rule, which is not punitive in nature).[31]

For the reasons articulated *supra*, the Court's opinion in *Vaughan* is not a picture of clarity, but, at its core, the Court's decision to allow a seaman wrongfully deprived of maintenance and cure to recover attorney fees is equitable in its thrust; it is designed to make the injured seaman "whole." In *Vaughan*, because of the shipowner's recalcitrance in withholding maintenance and cure, Vaughan "was forced to hire a lawyer and go to court to get what was plainly owed him under laws that are centuries old." 369 U.S. at 531. *See also, Terra West Townhomes, L.L.C. v. Stu Henkel Realty*, 996 P.2d 866, 873 (Mont. 2000) (Bad faith exception to the American Rule is a make whole remedy "to compensate a party who, through no fault of her own, was forced to hire an attorney . . ."); *Hutto v. Finney*, 437 U.S. 678, 689 n.14, 98 S. Ct. 2565, 57 L.Ed.2d 522 (1978) (thrust of bad faith exception to American Rule is to make plaintiff

[31] *Guevara* was overruled by *Townsend* because the Fifth Circuit held that punitive damages were not recoverable in cases of wrongful withholding of maintenance and cure.

"whole for expenses caused by his opponent's obstinacy."). Federal courts have held that fees under the bad faith exception rest on compensatory principles distinct from those upon which an award of punitive damages is based. *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383, 389-90 (2d Cir. 1985), *cert. denied*, 475 U.S. 1084 (1986).

Indeed, after *Vaughan*, the Supreme Court continued to recognize that such fees were compensatory in nature. *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718, 87 S. Ct. 1404, 18 L.Ed.2d 475 (1967).

Similarly, various federal circuit courts of appeals have confirmed that *Vaughan* stands for the proposition that attorney fee awards are compensatory in cases involving the wrongful withholding by a shipowner of maintenance and cure. *Centex Corp. v. United States*, 486 F.3d 1369, 1373 (Fed. Cir. 2007).

Indeed, the better-reasoned analysis of *Vaughan* confirms that fees are compensatory in nature. *See, e.g.,* 6 James Wm. Moore, *Moore's Federal Practice* ¶ 54.78[3] at 54-503 - 504 & n.29 (2d ed. 1994) ("The [*Vaughan*] court found that when a seaman's employer refused to pay the seaman maintenance that 'was plainly owed under the laws that are centuries old,' thus forcing the seaman to retain counsel and sue for it, the

expenses of the suit could rightly be treated as part of the compensatory damage.").[32]

Finally, as noted *supra, Vaughan* can also be read to justify an award of fees on equitable grounds. The thrust of equity is not punitive, but remedial. *Rummens v. Guaranty Trust Co.*, 199 Wash. 337, 347, 92 P.2d 228 (1939) (equity affords relief where procedures or remedies at law are unavailing). Indeed, when the Washington Supreme Court last crafted an equitable exception to the American Rule on fees in *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 37, 904 P.2d 731 (1995), it spoke in remedial or compensatory, and not punitive, terms; the Court exercised its equitable power to allow the recovery of fees where an insurer wrongfully denied coverage to an insured because of the fiduciary relationship between insurers and insureds, their disproportionate bargaining positions, and the costs incurred by an insured to compel the insurer to meet its legal commitments. The same analysis applies here.

The fee award obtained by Clausen here was properly treated as part of the compensatory "base" for calculating the punitive fee "cap."

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[32] As Professor Robertson contends, the punishment/deterrent policy behind punitive damages in wrongful withholding of maintenance and cure is not advanced by attorney fees because fee awards to not constitute a sufficient deterrent because they are blind to the conduct of the defendant and hence cannot be scaled to punish and deter reprehensibility. 70 La. L. Rev. at 488-89.

(ii) The Jury Was Not Limited to a 1:1 Ratio Between Compensatory and Punitive Damages

The jury's punitive damage award is not confined to a 1:1 ratio to the jury's compensatory damages award.

Icicle relies on *Exxon* for its contention that there is a 1:1 cap on punitive damages to compensatory damages in maritime cases. However, that decision involved damages occasioned by the infamous EXXON VALDEZ oil spill in Alaska. There, Exxon's personnel engaged in *recklessness*, not willful misconduct. When the United States Supreme Court stated that it imposed a cap of 1:1 in "such maritime cases" that did not involve "exceptional blameworthiness" or "behavior driven primarily by desire for gain" and that was "profitless for the tortfeasor," the Court obviously implied that the 1:1 cap was not universal. 128 S. Ct. at 2632. Moreover, the Court also focused on the substantial compensatory damages of $507 million awarded in that case, noting it was not a small case. *Id.* at 2626.[33] Thus, *Exxon* imposed a 1:1 ratio under those particular facts, *id.* at 2633, and it did not establish a 1:1 limit for *all*

[33] The *Exxon* court was motivated in large measure by the very size of the jury's compensatory damages verdict. Exxon's 1:1 cap was applied in non-maritime cases where the compensatory award, like that in *Exxon*, is particularly large. *State Farm*, 538 U.S. at 425 ("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

maritime cases, particularly a case like this where Icicle's conduct was willful and wanton.

Justice Ginsburg's concurring/dissenting opinion made it clear that a 1:1 ratio was unique to the facts of *Exxon* and did not apply to all maritime cases:

> The 1:1 ratio is good for this case, the Court believes, because Exxon's conduct ranked on the low end of the blameworthiness scale: Exxon was not seeking "to augment profit," nor did it act "with a purpose to injure." What ratio will the Court set for defendants who acted maliciously or in pursuit of financial gain? Should the magnitude of the risk increase the ratio and, if so, by how much?

128 S. Ct. at 2639.[34]

As a matter of federal maritime law, the *Exxon* court's 1:1 cap does not apply here. The trial court here carefully examined and analyzed all of the reasons Icicle's conduct was different than that of Exxon. CP 552-62. Icicle engaged in willful and wanton misconduct; its actions were

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[34] As one commentator observed:

> ...the language in *Baker* suggests that a jury will not necessarily be bound by the 1:1 cap unless the circumstances of the case in question mirror those in *Baker*, i.e.: 1) where the defendant's conduct is "worse than negligent but less than malicious," 2) where the conduct is not driven by the profit motive; 3) where the conduct is subject to regulatory sanctions; and 4) where the plaintiff's damages are significant and the compensatory award is substantial. The more difficult issue is what standard or cap will be imposed when the circumstances are different.

John W. Degravelles, *Supreme Court Charts Course for Maritime Punitive Damages,* 22 U.S.F. Mar. L. J. 123, 143 (2009-10). *See also,* Robertson, 70 La. L. Rev. at 498-99.

not merely reckless. Its actions in some instances were intentional. CP 554-57. Its actions were motivated by profit. CP 557. Its actions were fundamentally harmful to Clausen, who was vulnerable. CP 552-54, 557-59. The award to Clausen was modest so that the deterrent effect upon similar future conduct by Icicle was minimal. CP 559-60.

Under these circumstances, *Exxon* does not require the imposition of a 1:1 cap. Instead, as suggested by the Court, nothing should forestall a cap of 3:1 in a case such as this. This is certainly consistent with the ratio employed by states for more reprehensible conduct. It is certainly well within due process standards. *See infra.*

(iii) The Jury's Award Is Well Within Federal Due Process Norms on Punitive Damages

Icicle asserts that this Court should disregard other federal jurisprudence on punitive damages awards. Br. of Appellant at 34-36. This argument is entirely understandable, given the decisions of many courts upholding punitive damages awards that far exceed a 1:1 ratio with compensatory damage decisions. However, because Exxon's 1:1 cap does not apply in the present maritime tort case and because Washington law on jury damage decisions could figure significantly here, the Supreme Court's due process jurisprudence on punitive damages is relevant to this Court's analysis.

Under such jurisprudence, punitive damage awards must be assessed on a case-by-case basis. "That precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm*, 538 U.S. at 425.

In *Exxon*, the court noted that a majority of states establishing a cap have imposed a 3:1 ratio, 128 S. Ct. at 2631, the Court noted that most of those states require a showing of "the most egregious conduct" including intentional infliction of injury or harm, malicious behavior and "dangerous activity carried on for the purpose of increasing a tortfeasor's financial gain," *id.*, the precise conduct in which Icicle engaged here.

In its due process jurisprudence, the United States Supreme Court has provided some important guidance on permissible ratios. In *State Farm*, the Court indicated that few awards exceeding single digits would satisfy due process, 538 U.S. at 425, but certainly implying that awards below that ratio would satisfy due process.

In *TXO Production Corp.,* 509 U.S. at 453, the Court affirmed a punitive damage award that was 526 times as great as the compensatory damages. There, TXO contracted to purchase the oil and gas rights on a tract of land owned by Alliance. TXO subsequently manufactured a claim that title to the property was defective and attempted to renegotiate its deal with Alliance. When the negotiations were unsuccessful, TXO sought a

declaratory judgment to remove the purported defect. Alliance counterclaimed for slander of title and was awarded $19,000 in actual damages and $10 million in punitive damages. In affirming the award, the Court observed that it "is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. The Court then held that it did not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. *See also, Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S. Ct. 1032, 13 L.Ed.2d 1 (1991) (an award of more than 4:1 was "close to the line" but did not "cross the line into the area of constitutional impropriety.").[35]

Thus, the ratio of compensatory damages to punitive damages here was under 3:1. That ratio is well within established federal due process standards and should stand.

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[35] Many courts have upheld very high damage ratios. *See, e.g., Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 2994 (2008) (9:1 ratio appropriate where defendant's actions particularly reprehensible); *Southern Union Co. v. Irvin*, 563 F.3d 788, 790-94 (9th Cir. 2009) (3.1:1 upheld); *Jones v. United Parcel Service, Inc.*, 658 F.Supp.2d 1308 (D. Kan. 2009) (3.1:1 ratio in wrongful discharge case upheld); *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 741 (N.C. Ct. App. 2009) (25:1 ratio upheld where compensatory low and defendant's conduct reprehensible); *Jolley v. Energen Resources Corp.*, 198 P.3d 376, 385-86 (N.M. App. 2008), *cert. denied,* 202 P.2d 124 (N.M. 2008), *cert. denied,* 129 S. Ct. 1633 (2009) (6.76:1 ratio upheld when the conduct was particularly reprehensible).

(iv) Washington State Constitutional Standards Require That the Jury's Verdict Be Upheld

The Washington Supreme Court's *Endicott* decision concluded that Icicle had a right to a jury trial in a Jones Act case conducted in state court because once a Jones Act plaintiff chose to file an action at law in the Washington state court forum, article I, § 21 of the Washington Constitution dictated that a defendant could invoke the state constitutional jury right for civil claims in Washington. The choice to try this case to a Washington jury has consequences for Icicle. Once the state forum is chosen, state procedural law on jury trials flows from this election. 167 Wn.2d at 881. Substantive federal law dictates that an injured seaman like Clausen has the right to recover punitive damages against Icicle. Any limitations on the scope of the jury's ability to set them are a procedural aspect of the jury right *under Washington law* after *Endicott*, subject to federal due process constraints.

It is a clear principle of Washington constitutional law under article I, § 21 that the Washington Legislature cannot set statutory limits upon the recovery of compensatory damages. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711 (1989).

Moreover, Washington courts are constitutionally constrained from intruding upon the jury's damage award, whether compensatory or

punitive, in the absence of proof that the jury engaged in some misconduct or the award violated constitutional norms. In reviewing a jury's decision on damages entrusted to it under article I, § 21 of the Washington Constitution, this Court must give deference to the jury's decision. *Bunch v. King County Dep't of Youth Servs.*, 155 Wn.2d 165, 179-80, 116 P.3d 381 (2005) ("The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact. We strongly presume the jury's verdict is correct. The jury's role in determining noneconomic damages is perhaps even more essential.") (citations/quotations omitted). In *Bunch*, our Supreme Court articulated this constitutional deference by stating that a verdict must be upheld unless it is outside the range of substantial evidence on the record, or shock the conscience of the court, or appear to have been the result of passion or prejudice. To shock the court's conscience, the award must be flagrantly outrageous and extravagant. *Id.* at 179. *See also, Collins v. Clark County Fire Dist. No. 5,* 155 Wn. App. 48, 231 P.3d 1211 (2010) (Court of Appeals reversed trial court remittiturs, noting that a jury's verdict is strongly presumed to be correct.).

Washington's constitutionally-based policy of deference to jury verdicts on damages applies with equal vigor to punitive damages awards.

Application of Washington principles on punitive damages would not offend federal maritime law principles. The case here was tried in state court after all. Shipowners have an unambiguous obligation to pay maintenance and cure to injured crewmen like Clausen. Federal law after *Vaughan* and *Townsend* makes clear that fees are available to such crewman and, where appropriate, so are punitive damages. *Exxon* only limits punitive damages in maritime cases where the defendant's conduct is reckless, the defendant is not driven by a profit motive, and the plaintiff's damages are significant. None of these factors are present here. Washington principles on punitive damages in a case of this type will not disrupt maritime commerce or the uniformity of federal law.[36]

The only appropriate limit on the state court jury's punitive damage award, aside from Washington constitutional restraints, are due process principles. As noted *supra*, this jury verdict plainly withstands due process scrutiny.

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[36] There is no uniform rule for punitive damages in maritime cases where a defendant like Icicle has engaged in intentional conduct, for a clear profit motive, and the plaintiff's damages are relatively small. State law principles can be applied in maritime cases. *American Dredging Co. v. Miller*, 510 U.S. 443, 114 S. Ct. 981, 127 L.Ed.2d 285 (1984) (forum non conveniens). *See also, Paul*, 106 Wn. App. at 426 (Washington's wage statute and its fee provision would not disrupt the harmony and uniformity of federal maritime law, equity warrants a fee award); *Axess Int'l Ltd. v. Intercargo Ins. Co.*, 107 Wn. App. 713, 30 P.3d 1 (2001) (allowing award of attorney fees in shipper's action against surety on maritime surety bond).

Here, the jury was properly instructed on the law and Icicle has conceded an award of punitive damages is in order. It has also tacitly conceded that the jury's award did not violate federal due process norms, nor has it argued that Washington constitutional norms in the due process context are different than their federal counterparts.[37] Thus, under article I, § 21, the jury's decision here is entitled to substantial deference and must stand.

(3) Clausen Is Entitled to His Attorney Fees on Appeal

Insofar as Clausen recovered attorney fees below on the authority of *Vaughan*, he is entitled to recover his attorney fees on appeal. RAP 18.1(a).

F. CONCLUSION

Dana Clausen was entitled to maintenance and cure and damages for Icicle's negligence as a result of injuries he sustained on board the BERING STAR. Nevertheless, Icicle engaged in reprehensible conduct, manipulating Clausen's maintenance and cure for its own financial benefit, and wrongfully withholding it, to induce him to compromise his claim at a far lesser amount than that to which he was entitled.

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[37] Icicle fails to make a necessary analysis for independent state constitutional interpretation of article I, § 3 under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

The trial court correctly concluded Clausen was entitled to the fees he incurred to obtain maintenance and cure, and the jury, upon proper instructions, granted him punitive damages against Icicle. The trial court did not abuse its discretion in denying Icicle's CR 59(h) motion to amend the jury's punitive damage award.

This Court should affirm the trial court's judgment and award Clausen his costs on appeal, including reasonable attorney fees.[38]

DATED this 12th day of October, 2010.

Respectfully submitted,

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[38] Icicle is indiscriminate and harsh in its request for relief. Br. of Appellant at 50. It asserts that Clausen should be deprived of *any* fee award should this Court conclude that the fee issue is one for the jury. Where the trial court concluded that the fee issue was one for the court and did not instruct the jury on fees, the relief to which Icicle would be entitled, at most, is a new trial confined to the issue of Clausen's fees. CR 59(a) (retrial may be limited to part of the issues); *Mina v. Boise Cascade Corp.*, 104 Wn.2d 696, 707-08, 710 P.2d 184 (1985) (retrial properly limited liability where parties did not argue on appeal that damages were improperly handled below); *Holt v. Nelson*, 11 Wn. App. 230, 523 P.2d 1235 (1974) (retrial limited to damages only).

Icicle is not requesting a new trial on the question of punitive damages as it did not assign error to the trial court's instruction on punitive damages. Br. of Appellant at 2. The jury's award of punitive damages must stand, should Icicle prevail, with the trial court applying limits on punitive damages, if any, as determined by this Court.

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APPENDIX

Court's Instruction Number 13:

> You may award punitive damages only if you find that the defendant acted with willful and wanton disregard its obligation to provide maintenance and cure.
>
> However, you should not award punitive damages unless the shipowner acted willfully in disregard of the seaman's claim for maintenance and cure. The plaintiff may not recover punitive damages for the prosecution of the Jones Act or unseaworthiness claims. Thus, you may award only those punitive damages plaintiff incurred in pursuing the maintenance and cure claim and only if you find that the shipowner acted willfully in failing to pay maintenance and cure.
>
> The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff. The plaintiff has the burden of proving by a preponderance of the evidence that punitive damages should be awarded.
>
> If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct.

RP 1685-86.

Court's Instruction Number 15:

> The plaintiff also contends the defendant willfully and arbitrarily failed to pay maintenance and cure when it was due. On this issue, the plaintiff must prove each of the following elements by a preponderance of the evidence:
>
> 1. the plaintiff was entitled to maintenance and cure;

2. the defendant willfully and arbitrarily failed to provide maintenance and cure; and

3. the defendant's failure to provide maintenance and cure resulted in injury to the plaintiff.

RP 1687.

DEFENDANT'S PROPOSED INSTRUCTION NO. 22:

> Should you determine that the defendant willfully and arbitrarily failed to pay maintenance and cure and the plaintiff is entitled to recovery attorney fees, you must determine the amount to award. The plaintiff may only recover attorney fees spent in pursuing his claim for additional maintenance and cure. The amount of attorney's fees awarded must be "reasonable." To determine the amount of attorney's fees to award, you should multiply the number of attorney hours spent on the maintenance and cure claims times a reasonable hourly attorney fee rate.

CP 88.

MANUAL OF
MODEL CIVIL JURY INSTRUCTIONS
FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT

Prepared by the
Ninth Circuit
Jury Instructions Committee

2007 Edition

THOMSON
WEST

Mat. # 40606835

7.12 MAINTENANCE AND CURE—WILLFUL AND ARBITRARY FAILURE TO PAY

The plaintiff also contends the defendant willfully and arbitrarily failed to pay [maintenance] [and] [cure] when it was due. On this issue, the plaintiff must prove each of the following elements by a preponderance of the evidence:

1. the plaintiff was entitled to [maintenance] [and] [cure];

2. the defendant willfully and arbitrarily failed to provide [maintenance] [and] [cure]; and

3. the defendant's failure to provide [maintenance] [and] [cure] resulted in injury to the plaintiff.

If you find the plaintiff has proved each of the elements on which [he] [she] has the burden of proof, you should answer "yes" on the verdict form where indicated; otherwise answer "no."

Comment

If the jury finds that the defendant willfully and arbitrarily failed to pay maintenance or cure, the plaintiff will be entitled to reasonable attorneys' fees as determined by the court. A special interrogatory will be required. *See Kopczynski v. The Jacqueline*, 742 F.2d 555, 559 (9th Cir.1984) (leaving undisturbed jury's finding on special interrogatory that defendant's conduct was not "willful and arbitrary," and holding that plaintiff therefore was not entitled to recover attorneys' fees).

THE HONORABLE HOLLIS R. HILL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN, Plaintiff, v. ICICLE SEAFOODS, INC., Defendant.	Case No. 08-2-03333-3 SEA JUDGMENT ON VERDICT

1. Judgment Creditor and Judgment Creditor's Attorneys:
   Dana Clausen
   James P. Jacobsen, Beard, Stacey, trued & Jacobsen, LLP
   4039- 21st Ave. W., Ste. 401, Seattle, WA 98199; and
   Lawrence N. Curtis, 300 Rue Beauregard, Bldg. C, P.O. box 80247,
   Lafayette, LA 70598-0247

2. Judgment Debtor: Icicle Seafoods, Inc.,

3. Amount of Judgment: $1,589,980

4. Interest Owed to date of Judgment: $ See Below

5. Total Taxable Costs and Attorneys' Fees: $ 428,105.57

This matter having come on regularly for jury trial before the Honorable Hollis Hill; the Defendant, Icicle Seafoods, Inc., appearing and being represented by attorneys-of-record Philip Sanford and Thaddeus O'Sullivan; the plaintiff appearing and being represented by attorneys of record James P. Jacobsen and Lawrence N. Curtis; and the jury having rendered its verdict on November 16, 2009 against the defendant in the sum of $1,589,980. And the Court being fully advised in the premises,

JUDGE HOLLIS R. HILL
King County Superior Court
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Norm Maleng Regional Justice Center
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NOW, THEREFORE, it is hereby ORDERED that judgment be entered against the defendant in the sum of $2,018,085.57 with interest to run as provided by RCW 4.56.110 (3).

DONE IN OPEN COURT this 28th day of January, 2010.

Hollis R. Hill

HONORABLE HOLLIS HILL
King County Superior Court Judge

JUDGE HOLLIS R. HILL
King County Superior Court
Courtroom 3J
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JUDGE HOLLIS R. HILL

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN, Plaintiff, v. ICICLE SEAFOODS, INC., Defendant.	NO. 08-2-03333-3 SEA ORDER GRANTING PLAINTIFF'S MOTION FOR SANCTIONS

THE COURT having reviewed Plaintiff's Motion for Sanctions and the Memorandum and Declaration in Support thereof, the Defendant's Opposition to said Motion, the remaining record and the Court having heard testimony regarding said Motion at hearing on January 21, 2010, does hereby find and ORDER:

Plaintiff's Motion is GRANTED.

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The Court finds that defendant and defendant's counsel violated Civil Rule 26(g) and Civil Rule 26(e)(2). The Court exercises its discretion in this matter to impose monetary sanctions for these violations.

The defendant and its lawyer violated Civil Rule 26(g) when they recklessly certified that they had made reasonable inquiries and that based on those inquiries, they had produced in discovery the entire claim's adjuster's file with the exception of documents contained in the privilege log.

Mr. Kurt Gremmer, the claims adjuster, testified at the time of trial that in mid-2007 defense counsel had requested a copy of his file. In response to this request, he copied selected portions of the file which he thought counsel should see. He then forwarded those portions. Many documents in the adjuster's file were not provided to defense counsel at that time. Contained in the adjuster's file at that time, but not provided in discovery, was a Panel of Consultant's report regarding plaintiff Clausen's medical condition, which was highly relevant to the claims in this case as well as other relevant documents. In early, 2009 plaintiffs propounded a Request for Production seeking the entire adjuster's file. Defense counsel and the defendant's representative provided to plaintiff only those documents they had received from Mr. Gremmer in 2007. They certified that their response to this request was complete excepting certain documents covered by a privilege log provided to plaintiff's counsel. These certifications were made without any effort to review the adjuster's original file to ensure that all the documents therein had been produced and without asking the adjuster to update the materials he had provided earlier.

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Among the documents reviewed by defense counsel were certain communications that made reference to the Panel of Consultants report.[1] These references should have resulted in a reasonable inquiry as to the existence of such a report and as to why no such report was included in the documents in defendant's possession. Furthermore, documents which were listed in the privilege log provided in discovery indicated that defendant's agents had discussed among themselves that the Panel of Consultant's report "did not look good" for them regarding Mr. Clausen's claim for continuing maintenance and cure. Despite these red flags, evidently, no inquiry was made to determine the whereabouts of the report and the Panel of Consultants report was not provided to plaintiff in response to the discovery request. Neither were numerous other documents that the adjuster had withheld when, in 2007, he had provided portions of his file to defense counsel. Failure to make any reasonable inquiry before certifying the answers to discovery constitutes a reckless violation of CR 26(g) which mandates an appropriate sanction against defendant and defense counsel.

During trial, plaintiff's counsel raised the issue of possible missing documents from the claims adjuster's file. After this was raised, defense counsel came forward and acknowledged that he had just received that day from the adjuster a copy of the Panel of Consultant's report and that this was the first time he had ever seen it. This Court does not question defense counsel's veracity in this regard, but admonishes defense counsel for not providing the report to plaintiff before the issue was raised.

[1] The defense maintains that this report was not included when Mr. Gremmer produced portions for his file in 2007. Mr. Gremmer was at a loss to explain why that document would not have been copied and provided by his office, but he could not say with certainty whether or not it had been copied and provided.

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According to defense counsel, upon learning of the Panel of Consultant's report he had the claims adjuster bring his entire file to counsel's office for review that day. At this time counsel should have informed the Court and plaintiff's counsel that there were many documents that had not been provided in discovery. Instead, defense counsel resisted the calling of the claims adjuster in plaintiff's case in chief, resisted the enforcement of plaintiff's trial subpoena for the adjuster's file and resisted the production of the adjuster's file in open court. The defense was ordered to produce the entire file in court six trial days after defense counsel became aware that he had in fact failed to produce the entire adjuster's file as he had certified.

Documents in the adjuster's file which were not produced until during the trial were relevant to plaintiff's maintenance and cure, Jones Act and punitive damages claims. Defense counsel's failure to rectify its misleading certification of discovery responses in a timely manner constitutes a violation of Civil Rule 26(e)(2). This violation subjects defense counsel and defendant to such terms as the trial court may deem appropriate. CR 26(e)(4).

The withholding of the claims adjuster's file impacted the presentation of plaintiff's case. However, it is not clear to the Court, given the punitive damages award herein, that plaintiff's case was prejudiced. Therefore, the Court does not award compensatory sanctions to be paid to plaintiff. Rather, the Court orders sanctions to be paid into the court registry in the amount of $5,000 against defense counsel and $10,000 against the defendant. These amounts are designed for the purpose of deterring, punishing and educating those sanctioned regarding future rules violations of this nature. *Washington State Ins. Ex. Ass'n v. Fisons*, 122 Wn. 2d 299, 356 (1993).

IT IS SO ORDERED.

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Dated this 28th day of January, 2010.

Hollis R. Hill

HONORABLE HOLLIS HILL
King County Superior Court Judge

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JUDGE HOLLIS R. HILL

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN, Plaintiff, v. ICICLE SEAFOODS, INC., Defendant.	Case No. 08-2-03333-3 SEA Findings and Conclusions Regarding The Award Of Attorney's Fees

The following constitutes the Court's findings and conclusions regarding Mr. Dana Clausen's request for attorney's fees.

I. Introduction

On November 16, 2009, the jury returned a verdict against the defendant Icicle Seafoods, Inc. In their answers to Special Interrogatories Nos. 13 and 14, the jury found that the defendant unreasonably refused to pay Mr. Clausen's maintenance and cure. In their answers to Special Interrogatories Nos. 17 and 18, the jury found that the defendant "was callous and indifferent or willful and wanton" in its failure to pay maintenance and cure. The jury's findings entitle Mr.

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Clausen to an award of attorney's fees. *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962).

In seeking his attorneys' fees, Mr. Clausen relies upon the Declarations and Supplemental Declarations of James P. Jacobsen, Lawrence N. Curtis, and Joseph S. Stacey. He also relies upon the Declarations of Scott C.G. Blankenship and Kevin Coluccio.

The defendant filed its opposition to the motion for attorney's fees, supported by the Declaration of Michael A. Barcott.

The defendant takes no issue with the amount of time that was spent on the various tasks as outlined in the fee declarations. As such, there is no claim that plaintiff's lawyers wasted time or duplicated efforts.

II. Discussion

A. The Attorney's Fee Issue Is For The Court Not The Jury

Defendant argues that the award of attorney's fees for wrongful denial of maintenance and cure is an issue for the jury not the Court. Once the jury finds the defendant's acted willfully or wantonly, it is up to the Court to set the attorney's fees via a post-trial motion. *Incandela v. American Dredging Co.*, 659 F.2d 11, 15 (2d Cir. 1981). The court followed the same procedure in *Peake v. Chevron Shipping Co., Inc.*, 2004 AMC 2778 (N.D. Cal 2004), *rev'd on other grounds*, 245 Fed. Appx. 680 (9th Cir. 2007). This is the proper way to handle attorneys' fees and it is the way the Ninth Circuit Court of Appeals handles attorneys' fees in maintenance and cure cases. (Ninth Circuit Pattern Jury Instruction No. 7.12).

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The U.S. Supreme Court in *Vaughn v. Atkinson*, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962), held that the attorneys' fee award is made pursuant to the Court's equity jurisdiction. Courts, not juries, award equitable remedies. *Maher & Co. v. Farnadis*, 70 Wash. 250, 255-56 (1912)(no right to a jury trial on equitable issue); *State v. Evergreen Freedom Forum*, 111 Wash. App. 586, 609-612, 49 P.3d 894 (2002)(same). The award is made under the court's equity jurisdiction in order compensate the seaman for the economic harm he suffered by incurring attorney's fees to obtain his due. Under federal law, a trial court's equity power allows it to award attorney's fees in a maintenance and cure case, *Vaughn v. Atkinson,* or as damages. *U.S. v. Martinson*, 809 F.2d 1364, 1368 (9th Cir. 1987) ("Where a court of equity assumes jurisdiction because the complaint requires equitable relief, the court has power to award damages incident to the complaint.").

B. Methodology for Determining Reasonable Attorneys' Fees and Related Litigation Expense

Under federal law and the case of *Kerr v. Screen Extras Guild, Inc.*, 526 F.2d 67, 70 (9th Cir. 1975), the Court considers certain factors in awarding attorney's fees and costs. These factors are: (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal services properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; and (12) awards in similar cases.

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The trial court determines a reasonable fee by calculating a "lodestar" figure, which is the market value of the attorney's services determined by multiplying the hours reasonably expended in the litigation by the reasonable rate of compensation. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1983); *Perry v. Costco Wholesale Co.*, 98 P.3d 1264 (2004). The award of fees is left to the sound discretion of the trial court. *Id.* The calculation in this case has two important steps: (a) determining the number of hours reasonably expended by each attorney; and (b) establishing the rate of compensation for each attorney. These considerations will each be addressed below.

*1. **Number of Hours.*** The trial court must determine the number of hours reasonably expended in the litigation based upon reasonable documentation of the work performed. *Bowers*, 100 Wn.2d. at 597. This documentation need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, the type of work performed, and the category of attorney who performed the work. *Id.* The novelty and complexity of the issues are factors to consider in determining the reasonableness of the hours expended in the litigation. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993).

Recovery is also allowed for reasonable fees incurred in preparing the application for an award of costs and fees. *Steele v. Lundgren*, 96 Wn. App. 773, 781-82, 982 P.2d 619 (1999).

*2. **Hourly Rate.*** The total number of hours reasonably expended must next be multiplied by the reasonable hourly rate of compensation. *Bowers*, 100 Wn.2d. at 597. Where the attorneys in question have an established rate for billing clients, that rate will likely be the reasonable rate. *Id.* The attorney's usual fee is not, however, conclusively a reasonable fee and other factors may

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necessitate an adjustment. *Id.* In addition to the usual billing rate, the court may consider the level of skill required by the litigation, time limitations imposed on the litigation, the amount of the potential recovery, the attorney's reputation, and the undesirability of the case. *Id.* The reasonable hourly rate should be computed for each attorney, and each attorney's hourly rate may well vary with each type of work involved in the litigation. *Id.*

The Court has carefully considered the declarations and finds that the hours requested by Mr. Clausen should all be included in the loadstar.[1] The Court has carefully considered the evidence on the hourly rate and finds that $450.00 an hour for Mr. Jacobsen, Mr. Curtis, Mr. Stacey, and Mr. Beard is a reasonable rate in King County for trial lawyers of similar, skill, reputation and experience. The Court also finds that $150.00 an hour is a reasonable rate for Mr. Rainey, Mr. Curtis' associate attorney.

B. The Time That Plaintiff Requested Is Supported By The Case Law

Travel time and travel costs are included in an award of attorney's fees. *Stark v. PPM America, Inc.*, 354 F.3d 666, 674 (7th Cir. 2004) (travel time for out-of-town counsel compensable); *West v. Nabors Drilling USA, Inc.*, 330 F.3d 379, 395-96 (5th Cir. 2003) (travel, hotel, and meals compensable).

Plaintiffs' work on post trial motions for sanctions and fees is related to the maintenance and cure issues. The sanctions motion and the attorney fees motion are directly related to the maintenance and cure claim. The evidence withheld was directly relevant to the maintenance and cure claim, and the fees are awarded based upon the defendant's willful and wanton conduct.

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Moreover, fees for post trial work are properly recovered. *Weyant v. Okst*, 198 F.3d 311, 316-317 (2d Cir. 1999).

Mr. Clausen's counsel presented detailed summaries of their time which included the date the work was performed, a description of the work, and the time required. Reconstructed time, especially when it is in exacting detail as counsel presented here, fully supports an attorney's fee award. *E.E.O.C. v. Harris Farms, Inc.*, 2006 WL 1028755, 5 (E.D. Cal. 2006); *Frank Music Corp. v. Metro-Goldwin-Mayer Inc.*, 886 F.2d 1545, 1557 (9th Cir. 1989); *Freiler v. Tangipuhoa Bd. Of Educ.*, 185 F.3d 337, 349 (5th Cir. 1999).

D. The Defendant Chose Not To Offer Counter-Evidence To The Number Of Hours Requested.

The defendant takes issue with a few hours of the overall attorney's time. Mr. Clausen's counsel filed Supplemental Declarations addressing all of this "questioned" time or expenses. From these declarations the Court finds that the "questioned" time is properly included in the loadstar.

Beyond these specific objections the defendant uses non-specific arguments against Mr. Clausen's fee request. When it comes to opposing attorney's fees, the opponent must provide the Court with specific, detailed evidence to rebut the fee request.

> The fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked. The party opposing the fee application has a burden of rebuttal that requires submission of evidence to the district court challenging the accuracy and reasonableness of the hours charged or the facts asserted by the prevailing party in its submitted affidavits.

[1] In its reply brief, plaintiff's counsel reduced their calculations by three hours.

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> The plaintiffs' counsel submitted documentation of the hours expended and evidence in support of those hours. The district court's order reflects that the court carefully considered the plaintiffs' declarations and billing statements. The defendants failed to meet their burden of rebuttal by submitting evidence to challenge the assertions of the plaintiffs' counsel.

Gates v. Rowland, 39 F.3d 1439, 1449 (9th Cir. 1994) (citations omitted). Thus, other than on the hourly rate, the defendant has failed to offer any countervailing evidence, such as evidence of its own time spent on the case. Thus, the Court focuses on plaintiff's declarations to determine whether or not the hours are reasonable. The Court finds that, with the exception of 3 hours (which plaintiff in its reply brief acknowledges should be excluded), it should all be included in the loadstar.

E. Plaintiffs are at a Reasonable Market Rate for Lawyers of their Calibur in King County

The supplemental declarations of James P. Jacobsen, Scott C.G. Blankenship, and Kevin Coluccio provide additional evidence that the requested rate of $450 an hour is reasonable for high level trial work in the King County market.[2] In determining Mr. Clausen's counsels' rate, the Court will take into consideration that they have not requested any paralegal time as they could have done. *Missouri v. Jenkins*, 491 U.S. 274, 285, 109 S.Ct. 2463 (1989). The Court accepts Mr. Clausen's counsel's representation that hundreds of hours of paralegal time were necessary to prosecute the maintenance and cure issues. Thus, Mr. Clausen's lawyers' hourly rate necessarily includes the paralegal time which was not separately billed.

[2] The Court is entitled to rely upon the National Law Journal's billable hour survey attached to the Supplemental Declaration of James P. Jacobsen. *Smith v. Norwest Financial Acceptance, Inc.*, 129 F.3d 1408, 1418 (10th Cir. 1997) (trial judge entitled to rely upon published survey of hourly rates).

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F. In This Particular Case the Court can Estimate a Reasonable Segregation of Hours

The defendant claims that plaintiff should have done more to segregate hours between the bad faith maintenance and cure case and the Jones Act and unseaworthiness liability case. However, the facts of all causes of action arose from a common nucleus of operative facts. For example, the plaintiff's *voir dire* and opening statement were largely devoted to the maintenance and cure case and plaintiff's medical condition. There is no way to divide up the minutes between the Jones Act and unseaworthiness liability and the maintenance and cure claims. Other trial judges have recognized that when a trial involves both Jones Act and maintenance and cure issues, it is practically impossible to divide the time with exactitude. For example, in *Deisler v. McCormack Aggregates, Co.*, 54 F.3d 1074, 1087 (3rd Cir. 1995), the trial judge found that it was practically impossible to segregate between the Jones Act and the maintenance and cure claims. Thus, the trial judge apportioned the time 90 percent to maintenance and cure and 10 percent to the Jones Act case, then awarded 90 percent of the attorney's fees. The Court of Appeals affirmed.

Likewise, Judge Patel in *Peake v. Chevron Shipping Co., Inc.*, 2004 AMC 2778 (N.D. Cal. 2004), was faced with a Jones Act and maintenance and cure case. Judge Patel held: "these 'maintenance and cure' issues did overlap (significantly) with nearly all of the other liability issues in this action, and the 80% figure proposed by plaintiff is appropriate here." *Id.* Thus, Judge Patel attributed 80 percent of the attorney's fees to the maintenance and cure issues.

Here, the maintenance and cure issues were from the beginning (when the defendant first sued Mr. Clausen in federal court) central to this case. There were fourteen witnesses who testified at trial. Twelve of these witnesses testified either on direct or cross examination

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concerning the maintenance and cure issues. Given the overlapping evidence of the Jones Act and unseaworthiness claims, it is difficult to segregate services on each. Based on a review of the record, a fair estimate of counsel time expended solely on a claim other than "maintenance and cure" to be 10%.

Based upon the facts of this case, the Court will award 90% of the claimed hours.

G. The Kerr Factors

The Court will address the *Kerr* factors. The *Kerr* factors are in harmony with Washington law.

1. The Time and Labor Required

The time required in this matter is set forth in the Declarations of James P. Jacobsen, Lawrence N. Curtis and Michael Rainey, James M. Beard, and Joseph S. Stacey.

For a jury trial of this complexity this is a reasonable number of hours to be expended in this matter. In this case, the defendant takes no issue with the number of hours expended on each particular task. Thus, there is no evidence that the amount of time was unreasonable, or that any of the work was duplicative.

2. The Novelty and the Difficulty of the Issues Involved

Mr. Clausen's counsels have substantial experience handling Jones Act and maintenance and cure claims in state and federal court. However, this was their first case tried concerning punitive damages.

3. The Skill Requisite to Perform the Legal Services Properly

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A high skill level is required to properly try a Jones Act, maintenance and cure, and punitive damage case in the Superior Court. The proper presentation of the case required thorough knowledge of the Rules of Civil Procedure, the Rules of Evidence, the King County Local Rules, the substantive maritime law, substantive punitive damage law, and substantial amount of medical knowledge, and extensive prior experience trying these types of cases.

The lead trial counsel have a combined 54 years of maritime law experience developed in state and federal trial and appellate courts. Lead trial counsel possess a lengthy record of success in maritime trials. From the Court's observation, Mr. Jacobsen and Mr. Curtis are well seasoned, well prepared and highly competent trial lawyers.

4. The Preclusion of Other Employment by the Attorney Due To Acceptance of the Case

In this case Mr. Clausen's counsel did not turn down any cases because they had accepted this case.

5. The Customary Fee

In Jones Act and maintenance and cure cases the fee is almost always contingent. Seamen like Mr. Clausen simply cannot advance costs and pay lawyers an hourly fee.

6. Whether the Fee Is Fixed or Contingent

The fee in this matter is contingent. If there is no recovery in this matter no fee was due. While this fee arrangement is customary, it limits the number of attorneys willing to undertake such a case. It is a specialized area of practice and involves significant risks to the attorneys and their firms. It takes skilled attorneys with significant financial backing to undertake a case like this.

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Among other factors to be considered in a contingency case is the delay in the payment of fees. The delay in attorney's fees payment results in a very real loss in the time value of money.

Here, Mr. Clausen's lawyers were required to advance the costs of the case, pay interest on them, and run the risk of non-reimbursement if the case is lost. While the ultimate responsibility for costs rests with the client, as a practical matter, Mr. Clausen had no ability to pay the costs if he did not prevail.

Public policy greatly supports the contingency fee. However, the Court did not apply a contingent multiplier in this case finding that $450.00 an hour in a reasonable rate.

7. Time Limitations Imposed By the Client or the Circumstances

The client imposed no time limitations.

8. The Amount or Money at Stake and the Results Obtained

The amount of money at stake was substantial. The defendant's willful and wanton conduct supported a verdict of $1.3 million in punitive damages and an award of attorney fees and costs. The jury found that Mr. Clausen's rights to maintenance and cure were violated.

In setting attorney's fee awards, the U. S. Supreme Court places substantial emphasis on the results obtained.

> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . For example, a plaintiff who failed to recover damages, but obtained injunctive relief or vice versa, may recover a fee award based upon all hours reasonably expended if the relief obtained justified that expenditure of attorney time. . . in these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.

Hensley v. Eckerhart, 461 U.S. 424, 435 (1983).

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The results achieved fully support the amount of effort expended and justify the Court's attorney's fees award. *Id.*

9. The Experience, Reputation and Ability of Plaintiff's Counsel

The Declaration of James P. Jacobsen and Lawrence N. Curtis list the lead plaintiff's counsels' academic backgrounds, and professional experience. The attorney affidavits support a finding that the lead trial lawyers are experienced and well regarded members of the maritime bar.

10. The "Undesirability" Of The Case

This case may have been "undesirable" from a business perspective, but there was no community resentment to a seaman client or a claim of this nature.

11. The Nature and the Length of the Professional Relationship with the Client

There was no previous relationship between the plaintiff's counsel and Mr. Clausen.

12. Awards in Similar Cases

The attorney's fees awards in other bad faith, employment, and civil rights cases demonstrate the reasonableness of the request for an hourly rate of $450.00. The trial court in *Cornhusker Casualty Insurance v. Chris Kachman et al.*, Civil No. 3:05-cv-05026, Order Granting Plaintiff's Motion to Set Amount of Attorney Fee Award (W.D. Wash. September 1, 2009), awarded $450.00 an hour for the lead trial counsel. The evidence submitted by Mr. Clausen's lawyers shows that for trial lawyers of this experience, reputation, and specialty $450.00 is a reasonable market rate in King County, Washington.

H. The Court Awards Attorney Fees and Litigation Costs as Follows.

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Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, WA 98032-4429
(206) 296-9285

Attorney	Hours	Rate	Total
James P. Jacobsen	399.1	$450	$179,595.00
Joseph S. Stacey	41.5	$450	$18,675.00
James M. Beard	10	$450	$4,500.00
Lawrence N. Curtis	469	$450	$211,050.00
Michael Rainey	112	$150	$16,800.00
Total			$430, 620.00
-10%			-$43, 062.00
Grand Total			$387,558.00

The Court awards litigation costs in the amount of 90% of $10,237.18[3] to Beard Stacey Trueb & Jacobsen, LLP + $2,916.92 (for Westlaw legal research October and November, 2009) or $11, 838.69 to Beard Stacey Trueb & Jacobsen, LLP + $28,735.88 to Lawrence C. Curtis, for a total costs award of $40,547.57[4]

The Court will award supplemental fees and costs for the work on the post trial motions. Mr. Clausen's counsels are directed to submit any supplemental claims for attorney's fees after the deadline for filing and consideration of Rule 59 motions has expired.

It Is So Ordered.

[3] The dinner cost of $239.25 on 11/10/09 has been deducted has been deducted as unreasonable. Other costs of meals during case-related travel are reasonable expenses.

[4] 10% of costs billed by Beard, et. al. are deducted for the reason stated above for segregation of fees. All costs billed by Curtis are awarded because they pertain to expenses attributed to the maintenance and cure claims or to travel, which is all payable on the maintenance and cure claim.

JUDGE HOLLIS R. HILL
King County Superior Court
Courtroom 3J
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, WA 98032-4429
(206) 296-9285

Dated this 28th day of January, 2010.

Hollis R. Hill

HONORABLE HOLLIS HILL
King County Superior Court Judge

JUDGE HOLLIS R. HILL
King County Superior Court
Courtroom 3J
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, WA 98032-4429
(206) 296-9285

HONORABLE HOLLIS HILL

FILED
KING COUNTY, WASHINGTON
APR 14 2010
SUPERIOR COURT CLERK
BY JULIE WARFIELD
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DANA CLAUSEN,

Plaintiff,

v.

ICICLE SEAFOODS, INC.,

Defendants.

NO. 08-2-03333-3

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR SUPPLEMENTAL ATTORNEY'S FEES

CLERK'S ACTION REQUIRED

THIS COURT, having reviewed Plaintiff's Motion for Supplemental Attorney Fees re Post-Trial Motions, the Declarations of James P. Jacobsen and Lawrence N. Curtis, and the Defendant's Opposition to said Motion and the remaining record, does hereby find that Plaintiff is entitled only to compensation for attorney fees incurred to secure a maintenance and cure award, and ORDERS:

Plaintiff's Motion is hereby GRANTED IN PART AND DENIED IN PART.

1. The Court awards Plaintiff the sum of $3825.00 in supplemental attorney's fees, said amount to be taxed against the Defendant.
2. Plaintiff's Motion is denied with respect to additional fees.

IT IS SO ORDERED.

DONE IN OPEN COURT this 14th day of April, 2010.

Hollis Hill

HONORABLE HOLLIS HILL

JUDGE HOLLIS R. HILL
King County Superior Court
Courtroom 3J
Norm Maleng Regional Justice Center
401 Fourth Avenue North
Kent, WA 98032-4429

THE HONORABLE HOLLIS HILL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

DANA CLAUSEN,

Plaintiff,

vs.

ICICLE SEAFOODS, INC.,

Defendant.

Case No. 08-2-03333-3 SEA

ORDER DENYING DEFENDANT'S MOTION TO AMEND JUDGMENT

I. Introduction

The defendant has filed a Rule 59(h) motion asking the Court to eliminate or reduce the punitive damage award for its willful and wanton actions in denying Mr. Clausen the maintenance and cure to which the jury found he was entitled. The Court has carefully considered the briefs, affidavits, and arguments of the parties. For the following reasons the Court denies the defendant's motion.

II. Applicable Law

As Mr. Clausen's claims arise under the maritime law, federal law controls the outcome of this motion.

Under maritime law, the defendant has an affirmative duty to provide its employee with medical care. *The IROQUOIS*, 194 US 240 (1903). "The duty to provide proper medical treatment and

attendance for seamen falling ill or suffering injury in the service of the ship has been imposed upon the shipowners by all maritime nations." *Id.* at 241-242. The employer is the "legal guardian in the sense that it is a part of his duty to look out for the safety and care of his seamen, whether they make a distinct request for it or not." *Id.* at 247.

> Admiralty courts have been liberal in interpreting this duty 'for the benefit and protection of seamen who are its wards.' We noted in Aguilar v. Standard Oil Co., that the shipowner's liability for maintenance and cure was among 'the most pervasive' of all and that it was not to be defeated by restrictive distinctions nor 'narrowly confined.' When there are ambiguities or doubts, they are resolved in favor of the seaman. [citations omitted].

Vaughan v. Atkinson, 369 U.S. 527, 532 (1962).

The defendant was under the most stringent legal obligation to take detailed and affirmative action to *ensure* that Mr. Clausen received his maintenance and cure. Willful and wanton violation of this stringent legal duty is uniquely culpable conduct.

The defendant claims that the *Exxon* case provided a universal cap of a 1:1 ratio between punitive damages and compensatory damages in all maritime cases. The Court disagrees. In *Atlantic Soundings v. Townsend,* 129 S.Ct. 2561, 2574 n.11 (2009), the Supreme Court stated that it was not applying recovery cap as it did in the *Exxon Valdez* case. Specifically, the Court stated:

> Nor have petitioners argued that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. See *Exxon Shipping Co. v. Baker*, 554 U.S. ___, 128 S.Ct. 2605, 171 L. Ed. 2d 570, [slip op] at 42 (2008)(imposing a punitive-to-compensatory ratio of 1:1). We do not decide these issues.

Thus, *Atlantic Soundings* specifically did not impose a 1:1 limit as implied by the defendant.

Moreover, a careful examination of the *Exxon* case also teaches that the Supreme Court did not establish a bright line rule for all maritime cases. In *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2008 AMC 1521 (2008), the Supreme Court stated that it imposed a cap of 1:1 in "such maritime cases" which did not involve "exceptional blameworthiness" or "behavior driven primarily by desire

for gain" and that was "profitless for the tortfeasor" and that was the result of "reckless" rather than "intentional" behavior. *Id. at 2633-2634.* Moreover, the Court stated that in cases with substantial damages, $507,000,000 in the *Exxon* case, a 1:1 ratio can reach the outer limit of due process. *Id.* At 2634. Thus, *Exxon* imposed a 1:1 ratio under those particular facts, and it did not establish a 1:1 limit for all maritime cases.

The 1:1 cap applied in the *Exxon* case has also been projected as the appropriate cap in non-maritime cases where the compensatory award, like it was in *Exxon,* is particularly large. *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425 (2003)("When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.").

In assessing the punitive damage award in this particular case, "the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 575 (1996). The Supreme Court's jurisprudence provides a detailed list of the markers employed for judging the reprehensibility of the defendant's conduct. By these standards, the instant defendant's conduct reaches the zenith of reprehensibility, thus supporting a substantial punitive damage award. The Court will consider all of the relevant markers below.

The defendant argues that neither the award of unpaid maintenance and cure nor the award of attorney's fees are compensatory damages and therefore cannot be compared to the punitive award.[1] The defendant fails to cite any case on point to support its argument. To the contrary, the Court

[1] In its award of sanctions for defendant's failure to disclose its misdeeds, this Court was extremely lenient, both in terms of the sum awarded and it directing payment to the Clerk of the Court, rather than as compensation to Plaintiff. This was based on a finding that the jury's award of punitive damages was an indication that Plaintiff was not harmed in the verdict by the withholding. Should the punitive damages award be reduced, this Court's assessment of appropriate sanctions should be revisited.

concludes that the attorney's fees are compensatory damages, as are the awards for maintenance and cure. In discussing attorney's fees in *Vaughn v. Atkinson*, 369 U.S. 527, 531 (1962), the Supreme Court stated that the seaman "was forced to hire a lawyer to get what was plainly owed to him," and that "[i]t is difficult to imagine a clearer case of damages suffered for failure to pay maintenance than this one." Thus, the Supreme Court stated that the attorney's fees were awarded as damages for failure to pay maintenance. In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967), the Supreme Court stated even more explicitly that *Vaughn v. Atkinson* attorney fees are awarded as compensatory damages.

> Limited exceptions to the American rule have, of course, developed. They have been sanctioned by this Court when overriding considerations of justice seemed to compel such a result. In appropriate circumstances, we have held, an admiralty plaintiff may be awarded counsel fees *as an item of compensatory damages* (not as a separate cost to be taxed). Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962). [Emphasis supplied].

Thus, the Supreme Court itself holds that *Vaughn v. Atkinson* attorney's fees are "compensatory damages".

Specifically addressing a maintenance and cure case, the Fifth Circuit Court of Appeals also held that *Vaughn v. Atkinson* attorney's fees are compensatory damages, not punitive damages. *Guevara v. Maritime Overseas Corporation*, 59 F.3d 1496, 1501-03 (5th Cir. 1995), *rev'd on other grounds, Atlantic Soundings v. Townsend,* 129 S.Ct. 2561 (2009).

In other "bad faith" cases, akin to this case, courts have characterized awards of attorney's fees as compensatory damages and include the fees as compensatory damages to be compared against the punitive award. *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007)(applying Georgia law, holding that $1.3 million in attorney's fees is a compensatory award and should be compared against the punitive damage award); *Leeper-Johnson v. Prudential Ins. Co. of America*, 2009 WL 1318692, 23 (Cal. Ct. App. 2009)(court awarded attorney's fees included in

compensatory damages which are compared against the punitive award). Applying these cases, the attorney's fees will be characterized as compensatory damages.

Adding together the unpaid maintenance and cure and attorney's fees award, the amount of compensatory damages is $465,525. The punitive damages are $1.3 million. The resulting ratio is 1:2.79. The question before the Court is whether this ratio passes legal muster.

III. Facts Relating To The Defendant's Conduct

The Supreme Court has provided clear instructions for trial courts to determine whether a particular punitive damage award is appropriate. In *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-421 (2003), the Court identified markers of reprehensibility as follows: (1) Indifference to or reckless disregard for the health of others; (2) the target of the conduct was financially vulnerable; (3) the conduct involved repeated actions and was not isolated; (4) the harm was a result of intentional malice, trickery, or deceit, and was not an accident. *Id.* Furthermore, deliberate false statements, acts of affirmative misconduct, and concealment of evidence of improper motive demonstrates the most reprehensible conduct. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-580 (1996). "[M]alicious behavior" "carried on for the purpose of increasing the tortfeasor's financial gain" is "some of the most egregious conduct". *Exxon*, 128 S.Ct. at 2631-32. The reviewing court must also consider the potential damage if the defendant had succeeded in its scheme, as well as the size of the award that is required to deter the defendant from similar conduct in the future. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993).

Each issue will be addressed below.

(1) Indifference to or Reckless Disregard For the Health of Others.

The defendant demonstrated intentional indifference to Mr. Clausen's health. The defendant paid the Seattle Panel of Consultants' Dr. Richard Meeks to review Mr. Clausen's medical records. Its

hand-picked doctor advised the defendant that Mr. Clausen needed epidural spinal injections and was a back surgery candidate. Upon review of the report, Chris Kline, a corporate officer, considered the report "not good for Icicle." (Trial Exhibits 198 & 199 & Trial Testimony of Mr. Gremmert). Although advised by its doctor that the injections were medically necessary and related to Mr. Clausen's work injury, the defendant refused to pay for the injections as well as the surgery. The defendant persisted in this behavior despite repeated requests to authorize and pay for Mr. Clausen's necessary medical care. These actions demonstrate an intentional disregard for Mr. Clausen's health.

When the defendant obtained Dr. Meeks' opinion that Mr. Clausen was not at maximum medical cure, could benefit from epidural steroid injections, and was a surgical candidate, it did not provide a copy of the report to Mr. Clausen, the nurse case manager, or any of Mr. Clausen's treating physicians, leaving Plaintiff misled as to his medical condition. Instead, the defendant kept the report secret because it was "not good for Icicle". The implication is that Mr. Clausen's necessary medical care was going to cost the defendant money. These actions amount to intentional disregard for Mr. Clausen's health, and evidence a plan to trade Mr. Clausen's health for corporate profits.

Significant to this conclusion is that the defendant was under a legal obligation to *ensure* that Mr. Clausen received proper medical care for his shipboard injury. Thus, the defendant was under a strict and heightened duty to be concerned with Mr. Clausen's care which it intentionally and repeatedly repudiated.

(2) Mr. Clausen Was Financially Vulnerable.

Mr. Clausen's back injury rendered him unable to do any of the work for which he was qualified. Mr. Gremmert admitted that he knew this during the spring of 2006. (See also Exhibit 11, Dec. of Jacobsen). Also, the defendant paid only $20.00 a day in maintenance---clearly not enough money for safe and secure lodging with heat, cooling, shower, toilet and electricity, plus three meals a

day. Mr. Clausen was reduced to living in a broken down recreational vehicle with no heat, air conditioning, toilet, or running water. Eventually, the roof leaked and could not be repaired. Mr. Clausen was practically homeless, and therefore quintessentially financially vulnerable.

Ms. Moore testified at trial that during this time she knew or suspected that Mr. Clausen had only an old RV for shelter. Mr. Gremmert testifed that it is possible to live on $20.00 in a safe and clean environment and still eat three meals a day. The defendant knew that Mr. Clausen was financially vulnerable and that is why it wanted him to take the "bait" so that he could get "$$" by backing off of his medical care.

The manner in which the defendant sought to use Mr. Clausen's financial vulnerability against him is particularly reprehensible in light of the legal duty the defendant owed Mr. Clausen to ensure he received the medical care he needed.

(3) The Defendant Repeatedly Violated Mr. Clausen's Right To Maintenance And Cure.

Defendant repeatedly violated Mr. Clausen's right to maintenance and cure. Based upon the jury's award of unpaid maintenance and cure, Mr. Clausen's right to these benefits extended for a considerable time past the date when the defendant quit paying. Plaintiff's Trial Exhibits 59 to 123 are the 64 letters that Mr. Curtis sent to the defendant enclosing medical records and bills and asking for payment of cure.

(4) The Failure To Pay Maintenance and Cure Was the Result of Intentional Malice, Trickery and Deceit, And It Was Not A Mistake.

The decision to deny Mr. Clausen maintenance and cure was made by Ms. Laurenda Moore and it was an intentional decision, not a mistake. The claims adjuster's file demonstrates that the decision was carried out with both trickery and deceit.

In a letter dated June 20, 2006, Dr. Richard E. Marks told the defendant that Mr. Clausen had not reached maximum medical care, that he needed epidural steroid injections, and that he was a

surgical candidate. (Panel of Consultants Report, Exhibit 1 to the Declaration of James P. Jacobsen). The defendant refused to pay for this treatment. Instead, defendant sued Mr. Clausen in federal court.

The adjuster's file demonstrates a conspiracy within the defendant's corporate management to deny Mr. Clausen his medical care.

- On May 25, 2006, the defendant reported to the insurance company: "We feel that settlement in this range would be preferable to taking any chances with the outcome of a functional capacity exam and future medical treatment."
- On June 5, 2006, in telephone notes that the insurance company had authorized a settlement offer and that, "We should move on this before guy gets away from us—He agreed will talk to Leauri—Good."
- On June 9, 2006, in telephone notes the adjuster says: "----We Hv Reviewed the email from the nurse case mgr. Review earlier med recs ---Looks like medical situation is wide open again after we thought it was almost finished ---He agrees ---Maybe he will take bait & my to back down his medical treatment in order to get $$ by "closing" file."
- On June 28, 2006, in the telephone notes it states: "---Read med recs review Rpt ---Not good for Icicle ---We should really try and corral this guy ---May end up with a back surgery"

(Exhibits 4 and 2, Dec. of Jacobsen in support of Opposition to Motion to Amend Judgment).

Mr. Gremmert testified that the back surgery was expected to cost between forty and seventy five thousand dollars. Thus, beginning in the summer of 2006 the defendant engaged in an elaborate scheme to force Mr. Clausen to settle his claim in order to avoid paying for an expensive back surgery—a surgery which its own doctor concluded would be therapeutic.

The evidence at trial also established that Lori Gregoire, the nurse assigned by the defendant to monitor Mr. Clausen's medical care, believed that Dr. Brennan, Mr. Clausen's treating physician was

incorrect when he said Mr. Clausen had reached maximum medical cure. This was the same conclusion reached by Dr. Richard Meeks, defendant's hand-picked doctor. And Mr. Gremmert testified at trial that he accepted the fact that Mr. Clausen had not reached maximum medical cure as stated by Dr. Brennan.

Nevertheless, concealing Dr. Richard Meeks' opinion and that of Nurse Lori Gregoire, Mr. Gremmert was still relying upon Dr. Brennan's statement that Mr. Clausen had reached maximum medical cure to support the defendant's denial of maintenance and cure. (Exhibit 13, December 5, 2006 Facsimile from Kurt Gremmert to Larry Curtis, and Exhibit 14, letter dated December 12, 2006, Dec. of Jacobsen). These facts demonstrate the use of deceit, false statement and trickery, because the opinions of Dr. Meeks and Nurse Gregoire were withheld from Mr. Clausen, but the discredited opinion of Dr. Brennan was still being used to deny him maintenance and cure.

(5) The Defendant Employed Deliberate False Statements.

One example of the many false statements defendant made in denying Mr. Clausen maintenance and cure is contained in its federal court Complaint. On or about September 18, 2007, the defendant sued Mr. Clausen in the United States District Court in order to terminate his rights to maintenance and cure. The defendant's Complaint made deliberate false statements. Under the facts section, the defendant's Complaint stated:

> Throughout this matter Mr. Clausen has impeded his employer's right and obligation to investigate Mr. Clausen's ongoing entitlement to maintenance and cure by way of example and without limitation, failing to keep Icicle Seafoods, Inc. apprised of his medical status, failing to provide Icicle Seafoods, Inc. with copies of medical records, failing to adequately allow Icicle Seafoods, Inc. access to the treating physicians, failing to seek authorization for medical treatment, [and] failing to apprise Icicle Seafoods, Inc. of medical bills[.]

(Complaint ¶ 4.2, Exhibit 15, Dec. of Jacobsen). The adjuster's file demonstrates that each one of these allegations was false.

The progress reports and billing records from Nurse Lori Gregoire, show that for every step of the way, she talked with Mr. Clausen and his doctors, reviewed his medical records, and reported all of this information in detail to the claims adjuster. (Nurse Lori Gregoire's records, Exhibits 6 to 10, Dec. of Jacobsen). When the defendant filed its federal lawsuit, these records were still a secret in the claims adjuster's file. Trial Exhibit 202 was a letter dated June 29, 2006 from Mr. Curtis to Mr. Gremmert which contained numerous medical records, medical bills, a summary of medical bills that remained unpaid, and fifteen releases signed by Mr. Clausen so that the defendant could obtain his medical records directly from the providers. Mr. Gremmert admitted on cross examination that none of these releases for medical records were ever used. The law suit was filed two and one-half months after receipt of the releases.

Thus, the Complaint that the defendant filed in the U.S. District Court contained patently false and misleading statements.

These false statements were particularly egregious because the defendant owed Mr. Clausen a fiduciary duty to ensure that he received the medical care to which he was due.

(6) Defendant's Misconduct Was Motivated By Profit.

Mr. Gremmert's telephone notes of the conversations with Mr. Chris Kline, the defendant's corporate officer, demonstrate that the defendant was trying to "corral" Mr. Clausen and get him to take the "bait" of some small settlement "to back down his medical treatment in order to get $$". The motive was to enhance the defendant's profit margin. According to *Exxon,* willful and wanton conduct in the pursuit of profit is "the most egregious conduct".

(7) The Potential Harm If The Defendant Had Fully Succeeded In Its Plan Is Severe.

On June 9, 2006, Nurse Lori Gregoire reported to the defendant that, "Mr. Clausen reports increased pain to his hips and flare up on Saturday, described as a "lightning bolt" that

lasted about ten minutes to his left hip. Dr. Brennan deferred any work release and recommended referral to a neurosurgeon, Dr. Isaza." (Exhibit 5, Dec. of Jacobsen). Mr. Gremmert's notes from that same day state, "---We Hv Reviewed the email from the nurse case mgr. Review earlier med recs[.] ----Looks like medical situation is wide open again after we thought it was almost finished[.] ---He agrees[.] ---Maybe he will take bait & my to back down his medical treatment in order to get $$ by "closing" file." (Exhibit 2, Dec. of Jacobsen). As of June 9, 2006 it is therefore undisputed that the defendant knew that Mr. Clausen was suffering from "lightning bolt" pain and that his treating physician wanted Mr. Clausen to see a neurosurgeon for further treatment. Despite this knowledge, the defendant planned to offer Mr. Clausen "bait" of a small settlement to forego his medical treatment.

Later that summer, Mr. Clausen continued to suffer from excruciating pain. In Dr. Isaza's record from the Baton Rouge Orthopedic Clinic, dated August 17, 2006, is the following chart note.

> Patient advised to go to er if medicine is not helping his pain. His friend "franny" is aware of this—she states patient has threatened to kill himself and we advised her to go to ER—

(Exhibit 16). Nurse Gregoire reported this emergency room visit to the defendant. (Progress Report No. 6, page 2, Exhibit 6).

The defendant knew that Mr. Clausen was suffering from excruciating pain so intense that it was reported to his doctor that he contemplated suicide. Nevertheless, shortly after this chart note and the report from Nurse Gregoire, the defendant refused to pay any further maintenance and cure.

After the defendant refused to pay for his medical care, Mr. Clausen was able to borrow money to obtain some of the care which was required. If the defendant had fully succeeded in its plan, and Mr. Clausen had been unable to borrow money for his medical treatment and prescription medications, Mr.

Clausen would have been left suffering excruciating unremitting pain—pain so bad that he contemplated death as an alternative.

Moreover, the defendant quit paying maintenance in September, 2006, and only gave him a token amount in 2007. Mr. Clausen was living in his broken down RV in squalid conditions. Only because he borrowed money was he was able to put a modest roof over his head.

The potential harm, if the defendant's decision to deny Mr. Clausen his maintenance and cure had been fully successful, was hardship, pain, and devastation of his life.

(8) The Size of the Award That is Required to Deter the Defendant From Similar Conduct in the Future.

The jury in this case made a finding that the defendant's conduct was willful and wanton. Nevertheless, the defendant argues here that it should be subject to no punitive damages. The defendant needs substantial deterrence not to repeat what it did to Mr. Clausen.

First, that the defendant has opportunity to treat other workers in the same way it treated Mr. Clausen. The defendant admitted that it employs hundreds of seamen.

The defendant's opening statement claimed that the defendant had done nothing wrong. The defendant tried to blame its actions on Mr. Clausen. The defendant's closing statement made the same arguments. Mr. Gremmert and Ms. Moore claimed that they did nothing wrong. Both were unrepentant.

When this case came to trial the defendant knew that if it lost the case, it faced the prospect of an award of attorney's fees, costs, and punitive damages. During the entire time that it was willfully and wantonly denying Mr. Clausen maintenance and cure, and intentionally betraying its stringent duty to provide him proper cure, defendant's managers knew that it was exposed to damages and attorney's fees. Nevertheless, the defendant denied Mr. Clausen his due. The punitive damages must be too painful to make such conduct profitable.

The jury's modest award to Mr. Clausen for general damages under the Jones Act and the substantial comparative fault finding demonstrates that this jury in this case was careful and thoughtful. The jury did not go "wild" assessing Jones Act damages against the defendant. The jury's considered judgment was that it would require $1.3 million to adequately punish and deter the defendant. Considering, the stringent legal duty the defendant breached, the intentional and cynical manner in which Mr. Clausen was treated, and what the defendant put Mr. Clausen through--$1.3 million is an appropriate award.

(9) Punitive Damages Are Properly Awarded In Cases Involving Economic Harm.

The defendant claims that Mr. Clausen, because he cannot recover punitive damages, was not awarded physical damages for wrongful denial of maintenance and cure under the general maritime law. This argument is foreclosed by Supreme Court precedent.

> To be sure, infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty. [citation omitted].

BMW of North America, Inc. v. Gore, 517 U.S. 559, 576 (1996). Here the defendant's repeated acts were intentional and Mr. Clausen was a quintessentially financially vulnerable victim. Thus, this case warrants a "substantial penalty." *Id.*

The jury was entitled to take into consideration the conditions under which the defendant caused Mr. Clausen to live. The jury did not have to award him separate damages under the general maritime law in order for it to abhor what the defendant did to him. The Jury found the defendant's conduct abhorrent, which is why it awarded $1.3 million in punitive damages. Moreover, under the Special Verdict Form, the jury was required to award compensatory damages under the Jones Act before it reached the general maritime law. The

jury may have thought that the general maritime law compensatory damages duplicated the Jones Act damages and therefore declined to award any more.

The Supreme Court's markers of reprehensibility apply whether or not there is physical injury. And that analysis, applied to this case, fully supports the $1.3 million punitive award.

(10) The Ratio Of Compensatory Damages To Punitive Damages Is Well Within Federal Limits.

The nub of defendant's argument is that the punitive damage award is too high based upon the compensatory damages awarded in this case. "The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 425 (2003).

The application of the Supreme Court's punitive damage jurisprudence to this case establishes that under the "facts and circumstances" of this case the award is fully justified. Objective application of the Supreme Court's markers places the defendant's conduct at the zenith of reprehensibility. The defendant preyed upon a man incapable of work living in a broken down old RV. The defendant did it intentionally, repeatedly, over a period of years, and the purpose of its malicious actions was corporate profit. Moreover, while doing this, the defendant was subject to a stringent legal duty to do just the opposite—to carefully care for Mr. Clausen. Thus, a large punitive damage award is fully supported by the law.

The question then becomes what is a large award? That is determined by the reprehensibility of the conduct and the size of the compensatory award. The Supreme Court has many cases which discuss the ratio of punitive to compensatory damages.

In *TXO Production Corp.,* 509 U.S. at 453, 113 S.Ct. 2711, the Supreme Court affirmed a punitive damage award that was 526 times as great as the compensatory damages in action for slander of title. In affirming the award, the Supreme Court observed that it "is appropriate to consider the

magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460. The Court then held that it did not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character. Here, there is no drastic disparity between the harm and the potential harm and the punitive award. The ratio is less than three and fully supported by the case law and defendant's reprehensible conduct.

Many courts have upheld damage ratios higher than the one in this case. E.g. *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007)(ratio of 1:9 appropriate where the defendant's actions particularly reprehensible); *Southern Union Co. v. Irvin*, 563 F.3d 788, 790 - 794 (9th Cir. 2009)(1:3.1 upheld); *Jones v. United Parcel Service, Inc.*, 658 F.Supp.2d 1308 (D.Kan., 2009)(1:3.1 ratio in wrongful discharge case upheld); *Everhart v. O'Charley's Inc.*, 683 S.E.2d 728, 741 (N.C. Ct. App. 2009)(1:25 ratio upheld where compensatory low and defendant's conduct reprehensible); *Jolley v. Energen Resources Corp.*, 198 P.3d 376, 385-86 (N.M. App. 2008)(1:6.76 ratio is upheld when the conduct was particularly reprehensible).

This award is not out of line, does not unfairly punish the defendant, and is fully supported by the evidence before the jury and the controlling case law.

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IV. Conclusion

The defendant's Rule 59(h) motion is hereby denied.

It Is So Ordered.

Dated this 2nd day of March, 2010

Hollis R. Hill

HONORABLE HOLLIS HILL
Superior Court Judge

DECLARATION OF SERVICE

On said day below I deposited with the US Postal Service true and accurate copies of the following documents in Court of Appeals Cause No. 65119-6-I:

Brief of Respondent Clausen and Motion to Transfer Case to the Washington Supreme Court to the following:

Thaddeus O'Sullivan
Michael A. Barcott
Holmes Weddle & Barcott
999 3rd Avenue, Suite 2600
Seattle, WA 98104-4011

James P. Jacobsen
Beard Stacey & Jacobsen LLP
4039 21st Avenue West, Suite 401
Seattle, WA 98199-1252

Lawrence N. Curtis
PO Box 80247
Lafayette, Louisiana 70508

Originals filed with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-4170

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: October 13, 2010, at Tukwila, Washington.

C. Jones
Talmadge/Fitzpatrick